

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

AMY ELIZABETH CONNOR BOWEN,)
)
Plaintiff,) Case No.
) 3:13-0414
v.) Magistrate
) Judge Bryant
BRAD DOUGLAS PAISLEY, et al.,)
)
Defendants,)
)
and)
)
JOHN KELLEY LOVELACE and)
CHARLES CHRISTOPHER DUBOIS,)
)
Counterclaimants,)
)
v.)
)
AMY ELIZABETH CONNOR BOWEN,)
)
Counter-defendant.)
-----x

DEPOSITION OF JUDITH FINELL

October 29, 2015

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Robins Kaplan, LLP
601 Lexington Avenue
New York, New York

October 29, 2015
10:05 a.m.

DEPOSITION of JUDITH FINELL, an expert
witness in the above-entitled action,
held at the above time and place, taken
before Dawn Matera, a Shorthand Reporter
and Notary Public of the State of New
York pursuant to the Federal Rules of
Civil Procedure.

* * *

1
2 APPEARANCES:
3

4 AARON SANDERS, PLLC, ESQ.
Attorneys for Plaintiff
5 810 Dominican Drive
Suite 208
6 Nashville, Tennessee 37228-1906
BY: RICK G. SANDERS, ESQ.
7 rick@aaronsanderslaw.com
8
9

10
11 CONNOR & CONNOR, LLC, ESQ.
Attorneys for Plaintiff
12 224 Park Avenue SE
Aiken, South Carolina 29801
13 BY: CAMILLE GODWIN, ESQ.
camille@theconnorfir.com
14 (TELEPHONICALLY)
15
16
17

18 RILEY WARNOCK & JACOBSON, PLC
Attorneys for John Kelley Lovelace and
19 EMI April Music Inc.
1906 West End Avenue
20 Nashville, Tennessee 37203
BY: TIMOTHY L. WARNOCK, ESQ.
21 twarnock@rwjplc.com
22
23
24
25

1
2 APPEARANCES (Continued) :

3
4 WALLER LANSDEN DORTCH & DAVIS, LLP
5 Attorneys for Brad D. Paisley, Carrie
6 Marie Underwood, Charles C. DuBois,
Frank M. Rogers, Sea Gayle Music, LLC,
and Sony Music Entertainment

511 Union Street

7 Suite 2700

Nashville, Tennessee 37219

8 BY: ROBB S. HARVEY, ESQ.

robb.harvey@wallerlaw.com

9
10
11 ALSO PRESENT

12 Lawrence Ferrara, Ph.D.

13 Professor of Music

14 New York University

15
16
17
18 * * *

1 JUDITH FINELL

2 JUDITH FINELL, an expert witness herein,
3 having first been duly sworn by the
4 Notary Public, was examined and testified
5 as follows:

6

7 EXAMINATION BY MR. HARVEY:

8 Q. Ms. Finell, good morning.

9 A. Good morning.

10 Q. My name is Robb Harvey. I
11 represent a number of the Defendants.
12 And Codefendants' counsel is Tim Warnock.
13 And we both met you a moment ago.

14 A. Okay.

15 Q. Ms. Finell, from a
16 musicological perspective, what's your
17 definition of original?

18 A. That's difficult to answer.

19 MR. SANDERS: I am going to
20 object just to the extent that this is
21 calling for a legal opinion.

22 MR. HARVEY: Actually, it's not.
23 But are we going to have the standard
24 objections, Mr. Sanders?

25 MR. SANDERS: Just object to

1 JUDITH FINELL

2 form?

3 MR. HARVEY: Standard caption on
4 the deposition?

5 MR. SANDERS: Sure.

6 Q. Let me ask you again, please,
7 from a musicological perspective, what is
8 the definition of original?

9 MR. SANDERS: Same objection.

10 A. Musical -- in terms of music, I
11 would say music that has qualities that
12 are unusual and distinctive. It's really
13 hard to answer you in the abstract.
14 That's about the best I can do without a
15 specific piece of music to use as an
16 example.

17 Q. From a musicological
18 perspective, what's your definition of
19 distinctive?

20 A. Well, again, I would need to
21 take a piece of music and say this
22 element is distinct over that element is
23 distinctive.

24 But in some way, it's unusual.
25 It's not necessarily the most obvious way

1 JUDITH FINELL

2 of expressing a musical phrase or musical
3 work, if it's longer than a phrase.

4 Q. From a musicological
5 perspective, how do you determine whether
6 something is distinctive or not?

7 MR. SANDERS: Same objection.

8 A. Again, it comes down to the
9 specific work. So it's very hard for me
10 to answer that kind of general question
11 without looking at a piece of music and
12 showing examples as to why I believe
13 that.

14 But with my background of many,
15 many decades of studying music, I've
16 learned what are unusual, if you will,
17 sort of solutions to a musical beginning
18 point.

19 In other words, a kind of
20 musical journey that occurs when one note
21 follows another. And there are all kinds
22 of choices of rhythms, and pitches, and
23 length and other musical elements that
24 all combine together to form the final
25 musical statement. And it's the way

1 JUDITH FINELL

2 those are done. And sometimes they are
3 done in an unusual way that's not the
4 norm. And if it's more unusual, it's --
5 there is a spectrum. Some things are
6 more original, or more unusual or more
7 distinctive than others.

8 Q. So let me see if I can collapse
9 what you've said.

10 As a musicologist, in order to
11 determine whether something is
12 distinctive or original, you would
13 require a musical work to form that
14 opinion, correct?

15 A. Definitely.

16 Q. From a musicological
17 perspective, what does copyrightable
18 mean?

19 MR. SANDERS: Same objection.

20 A. Well, I am not an attorney. I
21 don't know that I would be the
22 appropriate person to answer that
23 question.

24 Q. I understand. But I will ask
25 you, do you have any definition for what

1 JUDITH FINELL

2 is copyrightable or what is not
3 copyrightable?

4 A. Well, if it conforms to the
5 copyright laws in whatever country the
6 copyright laws are being applied, because
7 it changes from country to country.

8 Q. Let's focus on the United
9 States, please, because that's what this
10 case is about.

11 What's your definition as a
12 musicologist of what is copyrightable?

13 MR. SANDERS: Same objection.

14 Q. If you have no definition,
15 that's an answer. But I would like to
16 have your answer?

17 MR. SANDERS: Same objection.

18 A. This is just what I've learned
19 by being in the field. It is not
20 something that is normally in the
21 musicologist's training in that it's a
22 legal concept.

23 As I understand it applying in
24 the field, since I've been in the field
25 applying it, I would say that there are a

JUDITH FINELL

lot of criteria. The year it was written, whether or not -- there is a certain fairly low bar in terms of originality, but there are certain elements in terms of are there any other third--- other works that it is either built upon or arranging instead of originating with itself.

There are a lot of different factors that go into the criteria to determine if something is copyright protected or not.

But again, I would think that's really outside the boundaries of my knowledge. I am not a lawyer.

Q. So is it fair to say that as a musicologist, you do not form an opinion about whether a work is copyrightable or not?

A. I've never been asked to, no.

Q. You've not been asked to do that in this case?

A. No, I have not.

Q. You have not been asked to do

1 JUDITH FINELL

2 that in any case in your career?

3 A. That's fair.

4 Q. So is it fair to say, as a
5 musicologist, you do not form an opinion
6 about whether a work or element of a work
7 are copyrightable?

8 A. You're the first attorney that
9 actually ever asked me that in over 20
10 years of doing this. But I could say and
11 qualify it a little bit and say we're
12 often asked in my firm to comment on
13 whether one piece of music could be seen
14 as infringing the copyright of another
15 because of substantial similarity
16 considerations.

17 But if a client were to say is
18 it copyrightable, I would give them the
19 telephone number of the next copyright
20 attorney I can think of, you know. I
21 would say that that's beyond my
22 knowledge.

23 Q. So beyond your knowledge. It's
24 not in your charge as a musicologist to
25 make a determination about whether an

1 JUDITH FINELL

2 element of a work or an entire work is
3 copyrightable, correct?

4 A. No, I have never been asked to
5 do that.

6 Q. You haven't done so in this
7 case?

8 A. No.

9 Q. Do you have any idea what
10 musicological analysis would be required
11 to determine if a work or elements in a
12 work were copyrightable?

13 A. Could you repeat the question,
14 please?

15 Q. Do you have any idea as a
16 musicologist what elements would be
17 required, what analysis would be required
18 to determine if elements in a work were
19 copyrightable?

20 MR. SANDERS: Same objection.

21 A. I don't know what the examiners
22 in the U.S. Copyright Office do to
23 determine granting copyright protection
24 of one work over another. But I think it
25 involves, you know, proper filing, and

JUDITH FINELL

particular dates and certain elements that are protected and certain ones that are not. And whether or not it's a derivative work or it's been licensed.

But those are involved with the copyright regulations. And that is really beyond my knowledge. I am asked whether or not one piece of music resembles another, or infringes another or appears to be original. But it's never gone so far as to ask me to draw a legal conclusion.

Q. You just said that you were asked to determine if one work infringes another.

What's your definition of infringement?

A. Copying.

Q. Copying?

A. Yes.

Q. Any other definition of infringement from a musicological perspective?

MR. SANDERS: Same objection.

1 JUDITH FINELL

2 A. Well, that's on a spectrum,
3 again. Sometimes things aren't exact
4 copies, but they seem to mimic or imitate
5 something else, but it's not 100 percent
6 the same. So there is judgment that's
7 required.

8 But on some level, I would, if
9 I felt something infringed something
10 else, there would be an element of
11 copying or imitation.

12 Q. So it's based on your feeling,
13 correct?

14 A. Not my feeling. My training.

15 Q. You just said if you felt
16 something was copied?

17 A. Well, by felt, I meant
18 believed.

19 Q. Okay. So based on your belief?

20 A. Yes.

21 Q. Based on your belief? You have
22 been deposed many times, correct?

23 A. Yes.

24 Q. So in this deposition, I'll ask
25 you to answer my questions. If you don't

1 JUDITH FINELL

2 understand something, please ask me to
3 repeat or recharacterize, otherwise I
4 will assume that you have understood my
5 question and answered it as fully and
6 completely as best you can.

7 Is that all right?

8 A. Yes.

9 Q. So we have the definitional
10 terms.

11 In your report that you've
12 submitted in connection with this case
13 you used the terms the Connor work and
14 the Paisley work. So just for ease of
15 today's discussion, let's use the term,
16 as best we can, "Connor work" as being
17 the submission that Ms. Connor made to
18 the copyright office in 2008.

19 Is that all right?

20 A. Okay.

21 Q. And it is not the demo that is
22 also referred to in your report. You
23 understand that we're not going to be
24 referring to the Connor work as the demo
25 today, correct?

1 JUDITH FINELL

2 A. I understand.

3 Q. You understand through counsel
4 for the Plaintiff that the demo work is
5 not in this lawsuit, correct?

6 A. Yes.

7 Q. You've been informed of that?

8 A. Yes.

9 Q. And the "Paisley work," let's
10 describe the Paisley song as the song
11 that has coauthors Paisley, DuBois and
12 Lovelace; is that okay? So we use those
13 two terms for "Connor work" and "Paisley
14 work"?

15 A. Yes.

16 Q. We asked Ms. Connor, at her
17 deposition at Page 305, what of her work
18 was copyrightable. And she didn't know.

19 You don't know what of
20 Ms. Connor's work is copyrightable, if
21 anything, do you?

22 MR. SANDERS: Same objection.

23 A. I don't understand your
24 question.

25 Q. From a musicological

1 JUDITH FINELL

2 perspective, do you know or have you
3 conducted any analysis to determine
4 whether any portion of Ms. Connor's work
5 is copyrightable?

6 MR. SANDERS: Same objection.

7 A. I was never asked to conduct
8 that kind of evaluation.

9 Q. So you have not conducted any
10 analysis to determine whether any element
11 of Ms. Connor's work is copyrightable,
12 correct?

13 MR. SANDERS: Same objection.

14 A. I would have to explain. I was
15 given a work that had already been filed
16 for copyright protection as both the
17 underlying work and, as I understood it,
18 the recording, which are two separate
19 copyrights.

20 I am not quite sure -- I don't
21 understand your question.

22 Q. Let me ask you this way. I
23 think you do.

24 Ms. Finell, you just said you
25 were not asked to determine whether any

1 JUDITH FINELL

2 portion of Ms. Connor's work was
3 copyrightable, correct?

4 A. That's correct.

5 Q. You have not conducted any
6 analysis to determine whether any portion
7 of Ms. Connor's work was copyrightable --

8 MR. SANDERS: Same objection.

9 Q. -- correct?

10 A. I have analyzed the music, but
11 it's not with the objective of
12 determining if it's copyrightable. I was
13 never asked to have that as a criteria.

14 Q. I am not trying to make this
15 difficult.

16 Is it fair to say that you have
17 not conducted an analysis to determine
18 whether any portion of Ms. Connor's work
19 is copyrightable?

20 MR. SANDERS: Same objection.

21 Q. I have not is a fair answer.
22 But I am trying to get you to answer the
23 question where I think the answer is
24 obvious.

25 A. Well, Mr. Harvey, if you

1 JUDITH FINELL

2 wouldn't mind just rephrasing. I don't
3 understand what you're asking.

4 Q. Have you conducted any
5 musicological analysis to determine
6 whether any portion of Ms. Connor's work
7 is copyrightable?

8 MR. SANDERS: Same objection.

9 A. That wouldn't be within the
10 purview of a musicologist. So I guess
11 the answer is no.

12 Q. Thank you. With the
13 understanding that I'm using the term
14 original, you understand that in order
15 for a work to be copyrightable, there has
16 to be originality to it; is that correct?

17 A. I understand it as a nonlawyer,
18 yes.

19 Q. Okay. So with the
20 understanding that I am using the term
21 original as you understand it as a
22 copyrightable -- excuse me, as you
23 understand it as a musicologist, did you
24 perform any analysis to determine whether
25 any portion of the Connor work is

1 JUDITH FINELL

2 original?

3 A. I don't understand your
4 question.

5 Q. Were you asked by counsel for
6 the Plaintiff to determine what elements
7 of the Connor work were original?

8 A. No, I was never asked that.

9 Q. So with the understanding that
10 I am using the term original as you'd use
11 it as a musicologist, did you perform any
12 analysis to determine whether any element
13 of the Connor work is original?

14 A. I'm sorry, I thought I just
15 answered that question a moment ago.

16 Q. So is the answer to my question
17 no?

18 A. No.

19 Q. The answer to my question is
20 no, correct?

21 A. That's correct.

22 Q. Thank you. Did you conduct any
23 analysis of the Connor song to determine
24 what was not original?

25 A. No.

1 JUDITH FINELL

2 Q. Did you perform any analysis to
3 filter out any nonoriginal elements of
4 the Connor song?

5 MR. SANDERS: Same objection.

6 A. Well, that's not a yes or no
7 answer. I would have to explain my
8 process, I guess.

9 Q. I will ask you your process.
10 But I think you already told us that you
11 conducted no analysis to determine what
12 was original in her song. You have
13 conducted no analysis to determine what
14 was not original in her song, correct?

15 A. Well, I need to -- I need to
16 explain something in order to answer your
17 question.

18 Q. I'll ask you about your process
19 in a moment.

20 My question on the table is,
21 did you perform any analysis as a
22 musicologist to filter out nonoriginal
23 elements of the Connor song?

24 A. I think that --

25 MR. SANDERS: Same objection.

1 JUDITH FINELL

2 A. I think the word that you're
3 using is inaccurate in the description.
4 I did filter out what I felt was
5 distinctive and recognizable in her song.
6 That was really the element that I
7 focused on in my analysis and assessment
8 of her song compared to the other song.

9 Q. So are you claiming that you
10 did do a filtering process?

11 A. It's part of my process to
12 determine what's distinctive, what's
13 unusual and if it sounds like another
14 work when I am asked to compare musical
15 works.

16 Q. And what of her song did you
17 filter out that was not distinctive?

18 MR. SANDERS: Same objection.

19 A. It's not -- that's not -- I
20 focused on what was distinctive. I can't
21 give you a list of what wasn't
22 distinctive. I focused on the, what I
23 saw as the key characteristics of her
24 song. And I don't mean key in a musical
25 sense. But meaning the main

1 JUDITH FINELL

2 characteristics of her song.

3 Q. So taking that answer,
4 Ms. Finell, is it correct that you did
5 not conduct a filtering analysis to take
6 out nonoriginal elements of the Connor
7 song?

8 MR. SANDERS: Same objection.

9 A. I really have never been asked
10 that question before. So in all the
11 years that I've had assignments from
12 attorneys, nobody's ever actually asked
13 me about filtering.

14 Q. So you did not do so in this
15 case, correct?

16 A. It is my process to determine
17 what distinctive characteristics are the
18 signature or profile of the song and what
19 distinguishes it.

20 Q. List the elements in the Connor
21 song that you removed or filtered as
22 being nonoriginal.

23 MR. SANDERS: Same objection.

24 A. I didn't do any removal. I
25 looked at it in a positive way, not in a

1 JUDITH FINELL

2 separation way, meaning I looked at what
3 was distinctive and that's what I
4 analyzed.

5 Q. Did you make the assumption
6 that the Connor work, the entire work is
7 original or copyrightable?

8 MR. SANDERS: Same objection.

9 A. I am not an attorney, so I
10 don't determine if something is
11 copyrightable or not.

12 Q. Did you make the assumption
13 that the entire work of Connor is
14 original?

15 MR. SANDERS: Same objection.

16 A. As I say, I wasn't focused on
17 originality. I was focused on
18 distinctiveness, recognizability, the
19 character of the song, and the features
20 that combine to create that profile for
21 the song, if you will.

22 Q. Ms. Finell, are you claiming
23 that the words "remind me," that is the
24 title of the Connor work, are original?

25 MR. SANDERS: Same objection.

1 JUDITH FINELL

2 A. I certainly didn't claim that
3 in my report. It's not the words alone.
4 It's the way various elements combined in
5 distinctive ways that I focused on, not
6 just one element like that in isolation.

7 Q. Okay. And if you will, if you
8 will answer my question, please, so am I
9 correct that you are not claiming that
10 the words "remind me" are original?

11 MR. SANDERS: Same objection.

12 A. I made no claims, no value
13 judgments on the originality level of any
14 of the material in either song that I
15 compared.

16 Q. Okay.

17 A. That word doesn't, I believe,
18 occur anywhere in my report.

19 Q. Your report states what it
20 states.

21 Is it your view that the words
22 "remind me" are original in the Connor
23 work?

24 MR. SANDERS: Same objection.

25 A. They're as original as I love

1 JUDITH FINELL

2 you. But what matters is how you set it
3 to music, what notes you use, what
4 rhythms, how you support it, how you
5 develop it. That's what matters in
6 analyzing and assessing a piece of music,
7 not an isolated element like that.

8 I am sure you would find 5000
9 songs with the words I love you. But how
10 they distinguish one another is how those
11 words are set and how they are
12 rhythmically organized, et cetera.

13 Q. So your focus has been on the
14 combination of music with the words
15 "remind me," correct?

16 A. Absolutely.

17 Q. Okay. And would you agree with
18 me that Connor does not own a copyright
19 on the title of her song "Remind Me"?

20 MR. SANDERS: Same objection.

21 A. Again, I am not an attorney.
22 And I have not been exposed to her
23 copyright documents with the U.S.
24 Copyright Office, but it is my
25 understanding as someone in the music

1 JUDITH FINELL

2 industry that titles alone are not
3 copyright protected, but lyrics are.

4 Q. So if it's your understanding
5 that the title is not copyrightable, as a
6 musicologist, is it your contention that
7 the lyrics "remind me," those two words,
8 are copyrightable or original to Connor?

9 MR. SANDERS: Same objection.

10 A. Again, I am not -- I never
11 focused on whether or not the lyrics
12 alone were, first of all, copyrightable,
13 because I am not an attorney. And that
14 isn't -- was never defined as my
15 assignment.

16 Q. Okay. So it is not your
17 position as a musicologist that Connor
18 has some exclusive right to use the words
19 "remind me" in the lyrics of her song,
20 correct?

21 A. I don't --

22 MR. SANDERS: Same objection.

23 A. I don't understand your
24 question, Mr. Harvey.

25 Q. It is not your position as a

1 JUDITH FINELL

2 musicologist that Ms. Connor has the
3 exclusive right to use the words "remind
4 me" in a song, correct?

5 THE WITNESS: Could you read it
6 back, please.

7 (The reporter read back as
8 follows:

9 "QUESTION: It is not your
10 position as a musicologist that
11 Ms. Connor has the exclusive right to
12 use the words "remind me" in a song,
13 correct?")

14 MR. SANDERS: Same objection.

15 A. Are you saying my view or my
16 understanding?

17 Q. If you draw a distinction
18 between those two, please tell us what it
19 is.

20 A. Well, it is my understanding
21 that words can be used in various ways.
22 But that lyrics within the context of a
23 song do have copyright protection even if
24 they are similar to other works of art
25 because, again, it's the combination.

1 JUDITH FINELL

2 It's not just how the words are used.
3 But what notes they are sung with and
4 other elements of musical expression.

5 Q. Is it your view as a
6 musicologist that Ms. Connor has an
7 exclusive right to use the words "remind
8 me" as lyrics in a song?

9 MR. SANDERS: Same objection.

10 A. I don't -- that's a legal
11 conclusion, I think. I don't believe
12 that I have the right degree to give you
13 that kind of legal opinion.

14 Q. What, if anything, did you do
15 to search for other works that are titled
16 Remind Me or have the words "remind me"
17 in the title?

18 A. Well, it wouldn't be the title.
19 It would be the hook of the song.

20 Q. Ms. Finell, what, if anything,
21 did you do to search for other musical
22 works that are titled "Remind Me" or have
23 the words "remind me" in the title?

24 A. I did nothing, because I see it
25 as a combination of a number of elements

1 JUDITH FINELL

2 including the use of the words "remind
3 me," including the way the notes set
4 those words, the structure of where the
5 words appear and many other musical
6 elements.

7 Q. So you did nothing to determine
8 whether other works have the title
9 "Remind Me," correct?

10 A. I didn't see that as relevant
11 here.

12 Q. Do you know how to do so?

13 A. Yes.

14 Q. And what would you do in order
15 to determine whether other works have the
16 title "Remind Me" or the words "remind
17 me" in the title?

18 A. Well, I have a big database of
19 other music that is used when I am doing
20 a prior art search, but it's also very
21 easy for a layperson to simply, you know,
22 Google those lyrics. And you would find
23 other songs that possibly are similar.
24 They might say remember me, or I recall,
25 or other words that refer to recollection

1 JUDITH FINELL

2 and remind conceptually.

3 Q. So other words would bring up
4 the same concept of recollection,
5 correct?

6 A. Possibly. But that's like
7 saying there are 500 Christmas carols
8 that all talk about Christmas. It's
9 really how they use the word Christmas or
10 Merry Christmas. Musically, that
11 distinguishes one from the other.

12 Q. If you were looking for other
13 songs titled "Remind Me" or had the words
14 "remind me" in the title, you would
15 search your database that you have
16 yourself, correct?

17 A. Yes.

18 Q. And you've done that in other
19 engagements in the past, correct?

20 A. Sometimes.

21 Q. You did not do so in this case?

22 A. No, because the combination
23 would have been unlikely to have been
24 found. The combination of all the
25 elements.

1 JUDITH FINELL

2 Q. You could also look at the
3 records, the online records of the United
4 States Copyright Office, could you not,
5 search by title?

6 A. You could.

7 Q. Have you done that in other
8 engagements?

9 A. The title isn't usually what I
10 am looking for. It is usually something
11 beyond the title. But I could, yeah.

12 Q. In this case, you have stated
13 that you think the hook is the words
14 "remind me." Correct?

15 A. Yes.

16 Q. So do you look for the hook in
17 your database in other engagements?

18 A. Sometimes.

19 Q. You did not do so in this case?

20 A. No, because all of the other
21 idiosyncrasies that set the hook in each
22 song that we've talked about in my report
23 I would be extremely unlikely to find
24 those combined in the same way.

25 Q. So you searched for -- your

1 JUDITH FINELL

2 focus in your report is on that one
3 discrete phrase "remind me," correct?

4 A. Well, that's the hook of the
5 song, so that's what I focused on, yes.

6 Q. So the answer to my question is
7 yes?

8 A. Well, it's not quite as narrow
9 as you stated the question. But that's
10 primarily what I focused on, yes.

11 Q. What, if anything, did you do
12 to search for other copyright works that
13 have the words "remind me" in the lyrics?

14 A. I did not.

15 Q. And do you know how to do so?

16 A. Yes.

17 Q. And how would you find other
18 works with the lyrics "remind me"?

19 A. Just as I said, I have a big
20 database of titles, lyrics, melodic
21 structures, and I would search them.

22 Q. And you did not do so in this
23 case?

24 A. No.

25 Q. You have done so in other cases

1 JUDITH FINELL

2 in which you have been engaged?

3 A. Oh, yes.

4 Q. And that wasn't part of your
5 charge in this case?

6 A. My charge?

7 Q. That wasn't part of the request
8 made to you?

9 A. I didn't -- it wasn't part of
10 the request, that's correct, but also, I
11 didn't think it was appropriate because
12 of the other elements that were part of
13 the song that resembled the Paisley song.

14 Q. Why didn't you look for other
15 songs that contained the words "remind
16 me" in the lyrics?

17 MR. SANDERS: Asked and
18 answered.

19 Q. No. Try again.

20 A. Yeah, I do believe that I just
21 answered you in my prior response.

22 Q. Ms. Finell, in this case, you
23 conducted no search for other songs that
24 contained the words "remind me" in the
25 title, correct?

1 JUDITH FINELL

2 A. Yes.

3 Q. And you conducted no search for
4 other songs that have the words "remind
5 me" in the lyrics, correct?

6 A. Yes.

7 Q. What, if anything, did you do
8 to search for any similar music as in the
9 Connor work?

10 A. I don't understand your
11 question.

12 Q. Did you conduct any
13 musicological analysis to see if there
14 was music that was similar to the music
15 contained in the Connor work?

16 A. I don't know what you mean by
17 music.

18 Q. Would I be correct in stating
19 that -- strike that.

20 Ms. Finell, you do not know
21 what I mean by the word music?

22 A. I know what the word music
23 means, Mr. Harvey. But I don't
24 understand it in the context of your
25 question.

1 JUDITH FINELL

2 Q. All right. There is music in
3 Ms. Connor's song, correct?

4 A. A song is music.

5 Q. There is lyrics in her song and
6 there is music in her song, correct?

7 A. Lyrics are part of the music.

8 Q. Okay. So then, let's say that
9 there is an instrumental portion and a
10 vocal portion in her song, correct?

11 A. Yes. In the Paisley song or
12 the Connor song?

13 Q. In the Connor song.

14 A. Yes.

15 Q. Let me put it this way:
16 Ms. Connor's song has a melody, correct?

17 A. Are you talking about the vocal
18 melody or the melody that the instrument
19 plays?

20 Q. I am talking about both.

21 A. Well, a series of pitches and
22 rhythms are defined as a melody, yes.

23 Q. Did you do any analysis to look
24 for a similar melody to Ms. Connor's song
25 in any other work other than the Paisley

1 JUDITH FINELL

2 song?

3 A. No.

4 Q. Can you name any other song
5 written or cowritten by Chris DuBois?

6 A. No, I cannot.

7 Q. Can you name any other song
8 written or cowritten by Kelly Lovelace?

9 A. Not offhand. I would probably
10 recognize the titles, but I can't list
11 them now.

12 Q. Can you list any other songs
13 written or cowritten by Brad Paisley?

14 A. No.

15 Q. You met or talked to the
16 Plaintiff's counsel prior to this
17 deposition to prepare, correct?

18 A. Yes.

19 Q. How many times?

20 A. One.

21 Q. In person or by telephone?

22 A. Well, by telephone, and then
23 today before we came here for a few
24 minutes.

25 Q. Ms. Finell, you are appearing

1 JUDITH FINELL

2 here today pursuant to subpoena, correct?

3 A. Yes.

4 Q. Thank you for accepting service
5 of that. And thanks to counsel on the
6 telephone for arranging that.

7

8 MR. HARVEY: We had been
9 provided a copy of a report. I will
10 hand a copy to the court reporter and
11 ask her to mark that as Exhibit 1.

12 [The Ms. Finell's expert
13 report, was hereby marked as
14 Defendants' Exhibit 1 for
15 identification, as of this date.]

16 Q. Ms. Finell, this is what we
17 received by e-mail from counsel who's
18 participating by telephone. It's got 38
19 numbered pages, and then a verification
20 at the very end.

21 I will ask you, please, just to
22 confirm that that's the complete report
23 that you prepared at the request of
24 Plaintiff's counsel and has been made
25 available to us?

1 JUDITH FINELL

2 (Witness reviews document.)

3 A. Yes, it is.

4 Q. And we may be referring to that
5 on and off during the day.

6 In advance of the deposition,
7 Ms. Gonser had also asked Ms. Godwin if
8 you had any other materials to provide
9 upon which you relied in preparing for
10 the deposition or upon which you relied
11 in preparing for this report.

12 We received last Friday night
13 some sheet music for the Paisley "Remind
14 Me." And I will hand a copy of that to
15 the court reporter and ask her to mark
16 that as number 2.

17 [The sheet music for the
18 Paisley "Remind Me," was hereby
19 marked as Defendants' Exhibit 2 for
20 identification, as of this date.]

21 Q. And will you identify what that
22 is, please?

23 (Witness reviews document.)

24 A. This is the commercially
25 available sheet music of the Paisley song

1 JUDITH FINELL

2 with some of my analytical markings. I
3 compared it to the recording, briefly,
4 just for reference.

5 Q. So these are your handwritten
6 notes on the sheet music?

7 A. Partly mine and partly my
8 colleague Marianne Csizmadia, whose name
9 is in the lower right-hand corner.

10 Q. And can you tell us whose
11 printed words are at the top of the first
12 page of that?

13 A. I don't know where you are.

14 Q. Right underneath, somebody has
15 written at the top "Song B. Note: Sheet
16 music corresponds well to recording,
17 although there are some minor
18 discrepancies, not" necessarily,
19 abbreviated Nec, "noted here."

20 Is that your handwriting or
21 hers?

22 A. I think that's mine. We work
23 together often on the same cases. So I
24 think that's mine.

25 Q. The dates at the top of the

1 JUDITH FINELL

2 page has 2/7/13 and 8/30/15.

3 Whose handwriting is that?

4 A. I think the dates are
5 Marianne's. There are two different
6 times that we worked on reports. Not the
7 exact dates, but that time period.

8 Q. What do those dates reflect?

9 A. I think the first report was in
10 February of 2013. So I just, we always
11 date when we look at music.

12 And then the second one had to
13 do with the fuller report. It was just
14 orienting.

15 Q. The complaint in this case was
16 originally filed after February of 2013.

17 So is it correct that you were
18 working on your analysis prior to the
19 filing of the lawsuit?

20 A. I would have to check my first
21 report. I don't remember the date of the
22 first report. It was 2013, though.

23 Well, it was dated March 28th,
24 2013. So I guess I was hired before
25 then. I mean, I usually am.

1 JUDITH FINELL

2 Q. You had brought a notebook with
3 you to the deposition. Can you identify
4 what that is?

5 A. Yes. It is a copy of each of
6 my reports, the two, the preliminary and
7 the full, the sheet music that looks just
8 like this with my markings and the
9 recording I was given by the Connor firm.
10 That is the music that's at issue in this
11 case.

12 Q. And these are -- these
13 documents that you have maintained, you
14 reviewed those in preparation for your
15 deposition, did you not?

16 A. Yes. And those were the basis
17 of my report, too.

18 Q. Okay. And can you identify for
19 us what you have in the notebook?

20 A. Okay. The first is March 28th,
21 2013 preliminary report. The.

22 Second one is September 12th,
23 2015 full report.

24 The third one is the sheet
25 music for Remind Me by Paisley published

1 JUDITH FINELL

2 by EMI Music 2011 copyright.

3 The next page is the lyrics of
4 the Connor song.

5 The next one is the lyrics of
6 the Paisley song.

7 And last is -- it's my Exhibit
8 A, which is attached to my report, but
9 was separate notes that are reflected in
10 the report examples.

11 It has arrows where the
12 appoggiaturas are. That's
13 A-P-P-O-G-G-I-A-T-U-R-A, I hope.

14 MR. HARVEY: We have not seen
15 the preliminary report.

16 I think what we'll ask,
17 Mr. Sanders, is that we get a copy of
18 this notebook that she's already
19 testified she reviewed in preparation
20 of the deposition, on a break.

21 MR. SANDERS: Preliminary report
22 was not produced?

23 MR. HARVEY: Never produced.

24 MR. WARNOCK: Want to go off the
25 record and go ahead and take it up

1 JUDITH FINELL

2 now?

3 MR. HARVEY: Sure, let's go off
4 a second.

5 (Off the record.)

6 Q. Ms. Finell, we are back after
7 the break.

8 MR. HARVEY: I will ask the
9 court reporter to mark as Exhibits 3
10 and 4, respectively, the preliminary
11 report and then the notations that you
12 have on Remind Me - Connor Copyright
13 that are dated September 12th, 2015.

14 [The preliminary report, dated
15 March 28th, 2013, was hereby marked
16 as Defendants' Exhibit 3 for
17 identification, as of this date.]

18 [The notations on Remind Me -
19 Connor Copyright, dated September
20 12th, 2015, was hereby marked as
21 Defendants' Exhibit 4 for
22 identification, as of this date.]

23 Q. Ms. Finell, you read your
24 report, your full report to prepare for
25 your deposition, correct?

1 JUDITH FINELL

2 A. Yes.

3 Q. You're familiar with the
4 contents?

5 A. Yes.

6 Q. And is your report accurate?

7 A. Yes.

8 Q. And you chose your words
9 carefully?

10 A. Yes.

11 Q. You meant what you said?

12 A. Yes.

13 Q. You were first contacted about
14 this case when?

15 A. I don't remember the exact
16 date, but it was in 2013, I believe.

17 Q. Who retained you?

18 A. Mr. Ken Connor.

19 Q. And did you provide counsel for
20 the Plaintiff the preliminary report that
21 is dated March 28th, 2013?

22 A. Yes, to Mr. Connor.

23 Q. What facts or data were you
24 given about the case or about the dispute
25 before giving counsel your preliminary

1 JUDITH FINELL

2 report?

3 A. It's been a long time since
4 then, but I will do my best to recall.

5 Basically, Mr. Connor described
6 a song by Lizza Connor entitled "Remind
7 Me" that I believe the songwriter, Lizza
8 Connor, felt was similar to the Paisley
9 song, and asked me to prepare an initial
10 evaluation comparing the two works.

11 Q. Were you ever asked to conduct
12 a prior art search?

13 A. No.

14 Q. And you have not done so?

15 A. That's correct.

16 Q. Do you intend to do so?

17 A. If I am engaged to do so, I
18 would be happy to do so.

19 Q. And who on the Plaintiff's
20 side, who have your communications been
21 with? Mr. Ken Connor is one, correct?

22 A. Yes.

23 Q. Have you had communication with
24 other employees or counsel on the
25 Plaintiff's side?

1 JUDITH FINELL

2 A. Yes. Caleb Connor and Camille.

3 I am sorry --

4 Q. Godwin?

5 A. Thank you.

6 Q. Yes, ma'am.

7 A. And recently with Mr. Sanders.

8 Those are the people.

9 Q. Have you ever spoken with the
10 Plaintiff?

11 A. Oh, the songwriter. I think I
12 did speak with her once.

13 Q. Tell me about that discussion.

14 A. It wasn't about actually this
15 song at all.

16 Q. Was it in connection with this
17 lawsuit?

18 A. No.

19 Q. So the Plaintiff gave you no
20 facts or data about this matter that you
21 relied upon for your report?

22 A. Not at all, no. I spoke to her
23 many, many months or weeks, at least,
24 after I had been engaged already to write
25 the report. It wasn't about these songs.

1 JUDITH FINELL

2 Q. And how many -- were you
3 familiar with the Connor work before you
4 were contacted?

5 A. No.

6 Q. Were you familiar with the
7 Paisley Remind Me before you were
8 contacted?

9 A. No, I was not.

10 Q. How many times did you speak
11 with Plaintiff's counsel before you
12 rendered your preliminary report?

13 A. I don't know.

14 Q. More than five, more than 10?

15 A. Well, my process is to conduct
16 a preliminary analysis and assessment of
17 the case and deliver an oral report,
18 either in person or by phone. And then
19 if I am asked to, I do a written report
20 after that.

21 So I am guessing I had, at
22 least, three or four conversations with
23 Mr. Connor, the senior Mr. Connor, I
24 mean, before turning in this report.

25 Q. And since then, after turning

1 JUDITH FINELL

2 in the preliminary report, how many
3 different communications have you had
4 with Plaintiff's counsel?

5 A. Well, it's been two years in
6 the interim. And I don't know. I can't
7 answer how many conversations I had.

8 Q. More than five, more than 10?

9 A. I would be guessing. Probably
10 10 or less, unless -- I don't know if
11 e-mails are considered a conversation or
12 not.

13 Q. Have you ever read any notes
14 prepared by Ms. Connor?

15 A. You mean musical notes or --

16 Q. Any notes of any kind?

17 A. -- words?

18 Q. Any notes of any kind?

19 A. The only reading I've done by
20 Ms. Connor has to do with the lyrics that
21 I was given of her music of the song I
22 was evaluating.

23 Q. Did you ever -- were you ever
24 provided sheet music for the Connor work?

25 A. No, I was never.

1 JUDITH FINELL

2 Q. Did you review the complaint or
3 amended complaint in this case, at any
4 time?

5 A. I don't think I've ever seen
6 that.

7 Q. Did you do anything to help
8 prepare the complaint or amended
9 complaint in this case?

10 A. No, I don't believe so.

11 Q. Were you ever given a draft of
12 the complaint or amended complaint prior
13 to their filing?

14 A. I don't recall, but I doubt it.

15 Q. Other than what you received in
16 preparing your preliminary report or
17 final report, is there any other
18 information that you would like to have
19 been provided?

20 A. No. I always ask if there is
21 anything like a lead sheet for the music
22 on either side, and if there are earlier
23 versions of the music, because I wanted
24 to make sure that I'm studying what would
25 be considered the most official musical

1 JUDITH FINELL

2 version of a particular song.

3 Often there are a lot of
4 versions of songs that composers do
5 before they finalize their songs. And I
6 was provided with what the Connor firm
7 felt answered my questions.

8 Q. And what was that?

9 A. I received electronically, and
10 later as a follow-up, a CD from the
11 Connor firm that contained the two
12 versions of the Connor song, the one that
13 was marked as a demo and then one that
14 was called the copyright copy, I believe,
15 they called it, and then the Paisley song
16 which are on this CD. And lyric sheets
17 for both songs. I think that's
18 everything they gave me.

19 Q. And the lyric sheet that's in
20 your book with the lyrics on the Paisley
21 song, is that something that you prepared
22 or was it provided to you?

23 A. It was given to me.

24 Q. Do you know who prepared it?

25 A. No. But I received it from the

1 JUDITH FINELL

2 Connor firm.

3 Q. Did you compare it to the sheet
4 music or to the recording that you
5 listened to?

6 A. To the recording. There was no
7 sheet music for the Connor song, either
8 version of the Connor song. And I didn't
9 really use the published sheet music for
10 the basis of my report, but I used it as
11 reference to kind of orient myself when I
12 was first listening to the recording.
13 It's a kind of road map of the song.

14 Q. And what was the task assigned
15 to you in preparing the preliminary or
16 the full report?

17 A. Well, those are different
18 tasks. Should I take them one at a time?

19 Q. What was the task assigned to
20 you for the preliminary report?

21 A. The purpose of that was to
22 compare the two pieces of music for
23 similarities and differences, and to
24 assess whether or not there would be a
25 reasonable case for substantial

1 JUDITH FINELL

2 similarity; and if so, to determine what
3 elements would contribute to that.

4 Q. What was your task assigned for
5 the full report?

6 A. Well, the full report was meant
7 as a much more in-depth analysis of each
8 musical work, and more transcription of
9 every iteration of the similar material
10 and a deeper analysis, basically.

11 Q. Your report has fragments of
12 transcriptions of the Connor work,
13 correct?

14 A. Which report?

15 Q. I am talking about your full
16 report, which is Exhibit number 1.

17 A. Could you repeat the question,
18 please?

19 Q. Your report contains
20 transcriptions in fragments of the Connor
21 work, correct?

22 A. Yes.

23 Q. And is that what appears on
24 Exhibit A at Page 27?

25 A. Exhibit A is an index of every

1 JUDITH FINELL

2 iteration of the hook lyrics "remind me"
3 in the Connor song.

4 Q. I understand that you have
5 identified what you considered to be a
6 hook as the words "remind me"?

7 A. Yes.

8 Q. So you had done a
9 transcription. And this was done by you,
10 personally?

11 A. Well, in combination with my
12 staff.

13 Q. Who is your staff?

14 A. It's on my Website. You want
15 me to list each of them?

16 Q. No, ma'am.

17 Who assisted you in reviewing
18 the transcriptions on Exhibit A?

19 A. There were two people. The
20 main ones was Marianne Csizmadia is her
21 name. Do you want me to spell that?

22 Q. It's listed on the sheet of
23 music, thank you.

24 A. And a new person whose last
25 name has just escaped me, I am

1 JUDITH FINELL

2 embarrassed to say, but Jennifer is her
3 first name. There are two people who
4 helped me sometimes with these kinds of
5 aspects of this.

6 Q. Is it correct to say that your
7 full report does not contain a full
8 transcription of the Connor work?

9 A. That's correct.

10 Q. And is it correct to say that
11 your full report does not contain a full
12 transcription of the Paisley work?

13 A. No, it doesn't.

14 Q. Your full report doesn't
15 contain a full transcription of the
16 chorus of either Connor or Paisley,
17 correct?

18 A. That's correct.

19 Q. Was the only transcription that
20 was ever prepared of the words "remind
21 me" and "Baby, remind me" in Connor and
22 Paisley?

23 A. I have to look through my
24 report to see if I did any other
25 transcriptions. If you could give me a

JUDITH FINELL

moment.

(Witness reviews document.)

Q. While you're looking, you don't know, having looked at the report to prepare for your deposition, whether you transcribed anything other than "remind me" and "Baby, remind me"?

A. I don't like to guess when I'm answering questions. If I could spend a moment, please.

Q. Please do.

A. And we are only talking about the full report, right?

Q. Yes, ma'am.

A. No, that's all that this included.

Q. Your full report contains all the transcriptions that you made or your staff made, correct?

A. Yes, it does.

And by the way, they differ from the sheet music of Paisley. I corrected some of the sheet music that was, some of the notes and rhythms, et

1 JUDITH FINELL

2 cetera, were incorrect as compared to the
3 recording.

4 Q. And did you prepare sheet music
5 for the Connor Remind Me?

6 A. No, I did not.

7 Q. But you did review the sheet
8 music for the Paisley Remind Me that you
9 had downloaded, correct?

10 A. That I downloaded?

11 Q. Well, on what is Exhibit 2,
12 Remind Me, the sheet music for Paisley?

13 A. Yes.

14 Q. And you downloaded that from
15 some source, correct?

16 A. That's right.

17 Q. Do you agree that a composition
18 may be represented in the form of notated
19 sheet music, as a musicologist?

20 A. Yes, but it could be
21 representing a recording, or it could
22 represent an underlying work which may be
23 differentiated from a particular version
24 that be on the recording.

25 Q. Do you agree that a sound

1 JUDITH FINELL

2 recording results from a fixation of
3 musical spoken or other sounds?

4 MR. SANDERS: Object to the
5 extent it's calling for a legal
6 conclusion.

7 A. I really don't understand your
8 question.

9 Q. How do you define a sound
10 recording?

11 A. In a musical -- in the musical
12 context or another --

13 Q. As a musicologist, how do you
14 define a sound recording?

15 MR. SANDERS: Same objection.

16 A. I am saying in musical context
17 or other kind of sound recordings that
18 are not musical?

19 Q. I am not talking about
20 theatrical. We are not talking about
21 motion pictures today. Talking about
22 music.

23 In a music context, as a
24 musicologist, how do you define a sound
25 recording?

1 JUDITH FINELL

2 A. A sound recording is a fixation
3 of a performance of a musical work, but
4 it is only of that performance. It is
5 not necessarily of the underlying core
6 work.

7 Q. Did your work, in this case,
8 mirror what you usually do in forming an
9 opinion as a musicologist?

10 A. Definitely.

11 Q. As a musicologist and you
12 analyzing two musical compositions in
13 order to form an opinion about whether
14 one copied the other, what are the
15 fundamental elements to be examined?

16 THE WITNESS: Could you repeat
17 the question, please.

18 (The reporter read back as
19 follows:

20 "QUESTION: As a musicologist
21 and you analyzing two musical
22 compositions in order to form an
23 opinion about whether one copied the
24 other, what are the fundamental
25 elements to be examined?")

1 JUDITH FINELL

2 (Record read.)

3 A. It depends on if I'm analyzing
4 music that is in written form such as a
5 lead sheet or a score, or if I'm
6 analyzing a recording of a musical work,
7 which is a different element in a musical
8 work.

9 Q. In this case, you were
10 reviewing two recordings, correct?

11 A. That's what I was hired to do,
12 yes.

13 Q. So as a musicologist, when
14 you're analyzing two musical
15 compositions, two recordings of musical
16 compositions in order to form an opinion
17 about copying, what are the fundamental
18 elements to be examined?

19 A. Again, if I am starting from
20 the recording and not from the underlying
21 music that led to the recording, then I
22 would be analyzing the core musical
23 elements to begin with to compare, which
24 would be melodies, meaning pitches and
25 rhythms, lyrics and how the lyrics are

1 JUDITH FINELL

2 set to music, structure, harmony and many
3 other elements. But those are some of
4 the basic ones.

5 Q. What are the many other
6 elements to be examined?

7 A. Well, when you have a
8 recording, you have other elements that
9 would be considered beyond the underlying
10 work, such as arrangement, what voicings
11 have been used, is the music sung by a
12 woman or a low male voice, are there
13 instruments that are supporting the vocal
14 lines, are there -- what kind of
15 instruments are playing. All of that
16 occurs on a recording or in a live
17 performance, but isn't necessarily
18 reflected on the underlying, what you
19 would call, the deposit copy with the
20 copyright office.

21 Q. Are those elements less
22 significant in determining whether there
23 has been copying from one musical
24 composition of another?

25 A. I don't understand what you

1 JUDITH FINELL

2 mean by "those elements."

3 Q. The ones you just referred to
4 as the other elements, are those ones
5 that, as a musicologist, you considered
6 to be less significant in determining
7 whether there has been copying between
8 two songs?

9 A. It's not a yes or no answer,
10 because it depends on the reason for my
11 assessment and my assessing that one
12 recording copied another, whereas every
13 element that one hears is at issue, or is
14 it the underlying body of the music
15 itself that has been accused of being
16 copied.

17 It really depends entirely on
18 the similarity and the position of the
19 different people in conflict.

20 Q. When I asked you about
21 fundamental elements, you mentioned
22 melodies, lyrics, structure and harmony.

23 Are those the fundamental
24 elements that you consider as a
25 musicologist in determining whether there

1 JUDITH FINELL

2 has been copying?

3 A. I have the same answer that I
4 gave you a moment ago, Mr. Harvey, that
5 if I am being asked to assess the
6 underlying music, those would be the
7 elements. But if I am being asked to
8 compare the recorded version of the
9 underlying music, then elements beyond
10 that are significant, too.

11 Q. And which were you asked to do
12 in this case?

13 A. It wasn't very specific. I was
14 just given what existed on each song
15 which was a recording. That was my
16 starting point. And so that's what I
17 compared.

18 Q. As a musicologist in music
19 copyright cases, do you have an
20 understanding of the terms substantial
21 similarity?

22 A. I do, although it is, I think,
23 considered a legal term, but, yes, I do
24 understand how I use it.

25 Q. How do you use it? What's your

JUDITH FINELL

definition?

A. Well, again, there is a, sort of a spectrum. But in general, substantial similarity, to me, means whether or not two musical works contain both a quantity of similar material, and that the material is of importance within either or both of the songs so that it's both qualitatively and quantitatively similar.

And then there is how the degree of similarity will determine how very much or very little they are substantially similar.

MR. WARNOCK: May I ask you to read that last answer back, please.

(The reporter read back as follows:

"ANSWER: Well, again, there is a, sort of a spectrum. But in general, substantial similarity, to me, means whether or not two musical works contain both a quantity of similar material, and that the

JUDITH FINELL

material is of importance within
either or both of the songs so that
it's both qualitatively and
quantitatively similar.

And then there is how the degree
of similarity will determine how very
much or very little they are
substantially similar.")

MR. WARNOCK: Thank you.

Q. Are you using the term
substantial similarity in a musicological
or a legal sense?

A. It's kind of the intersection
of musicology and law, because in my
training as a musicologist, substantial
similarity and striking similarity and
those kinds of legal terminology, and
protectable and those kinds of words were
not ever brought up. It was only brought
up when I began to work in copyright
infringement cases that this became an
element of my work.

Q. Is there a universally
understood definition recognized in the

1 JUDITH FINELL

2 musicological literature for substantial
3 similarity?

4 A. I would say no.

5 Q. You're not aware of any
6 musicological literature that would
7 define substantial similarity?

8 A. I've seen it used a great deal,
9 often incorrectly. But it's not, it's
10 not defined as other musical terminology
11 would be, whether it's pitch, rhythm,
12 duration, structure. Those are
13 musicological terms.

14 This is -- what you're
15 describing is more of a legal concept
16 that's been, in essence, introduced into
17 the field of musicology.

18 Q. So you're basically using your
19 own definition that you have derived
20 after years of experience?

21 A. Right. After working with
22 attorneys who have defined it to me. And
23 I've synthesized it to some extent.

24 Q. So you're using your own
25 definition, correct?

1 JUDITH FINELL

2 A. I'm using the definition that I
3 learned from the attorneys I've worked
4 with.

5 Q. Have the attorneys in this case
6 taught you a definition for substantial
7 similarity?

8 A. No.

9 Q. And is the performance of the
10 song part of the substantial similarity
11 analysis?

12 MR. SANDERS: Object to form.

13 A. I don't understand your
14 question.

15 Q. Well, tell me, what's your
16 typical approach as you come across two
17 recordings, as you did in this case,
18 what's your typical approach in terms of
19 defining substantial similarity? List
20 the steps for me.

21 A. Oh, all right. Well, I listen
22 to both songs, and I determine if there
23 is material that sounds alike between
24 them. And if so, I usually start to
25 analyze it by transcribing those

JUDITH FINELL

particular passages, if there is, in fact, no underlying trustworthy written form of the music, which is common today. There is rarely written music that is trustworthy enough to use as the basis of my analysis.

And once that's transcribed, usually it is transposed into the same key for the purposes of comparing the various pitches so that they are, we're basically comparing the same context of the music. That's considered standard musicological practice for musical comparison.

And then I set about determining what, if anything, makes the compared material sound similar to one another. Is it pitches, is it rhythms, is it lyrics plus pitches and rhythms, is it an unusual feature, et cetera. There is a whole series of criteria that is applied to that.

And that begins sort of the journey of determining whether or not one

1 JUDITH FINELL

2 piece of music may be substantially
3 similar to another one.

4 Q. It begins the journey?

5 A. Yes.

6 Q. And what series of criteria do
7 you follow?

8 A. I just listed them.

9 Q. So that's the range of the
10 criteria that you follow, correct?

11 A. Well, that's the basis of it.

12 Q. As you use the term substantial
13 similarity or substantially similar in
14 your final report, have you provided the
15 definition that you used for
16 substantially similar?

17 A. In the report? No.

18 Q. You did not in the report.

19 On the record today, when I was
20 asking about substantially similar, have
21 you now provided the definition that you
22 used for substantially similar as used in
23 your report?

24 A. It's as I applied it to my
25 report. I mean, I didn't -- I just

1 JUDITH FINELL

2 explained the context of my understanding
3 of substantial similarity. But I didn't
4 -- I don't have a section in my report
5 that describes that definition.

6 Q. And so as used in your report,
7 what definition of substantially similar
8 or substantial similarity did you use?

9 A. The one I described to you a
10 few questions back.

11 Q. Thank you. That's my question.
12 You have stated on the record
13 the definition for that term as used in
14 your report, correct?

15 A. I would have to have my answer
16 read back to answer you.

17 Q. I think we'll move on.

18 Have you ever provided an
19 opinion that a certain percentage of a
20 Defendant's work is attributable to a
21 Plaintiff's work?

22 A. Sometimes.

23 Q. On how many occasions?

24 A. I don't know.

25 Q. You did so in this case?

1 JUDITH FINELL

2 A. Not a percentage. I am
3 thinking of cases that are digital
4 sampling cases where the fixation of
5 sound has been lifted and placed into a
6 secondary recording.

7 Q. So in this case, you have not
8 provided an opinion about a certain
9 percentage of the Paisley work being
10 attributable to the Connor work, correct?

11 A. I didn't say it was
12 attributable. But I did say that similar
13 material occupies nine iterations in the
14 Connor work and 19 iterations in "Remind
15 Me." And I did -- I am sorry, in
16 Paisley. And I did define how much time
17 that occupied. But I didn't use the word
18 percentage. I didn't extend that into a
19 mathematical formula.

20 Q. So from your count, there were
21 nine iterations of the words "remind me"
22 in the Connor work, correct?

23 A. There were nine iterations of
24 the hook "remind me" in the Connor work,
25 yes.

1 JUDITH FINELL

2 Q. And you can continue using the
3 word hook all day long if you choose to,
4 but am I correct, nine iterations of the
5 words "remind me" in Connor, correct?

6 A. That's correct.

7 Q. And 19 iterations, by your
8 count, of the words "remind me" in
9 Paisley?

10 A. Yes. But they both also vary
11 it with what I call the "partner phrase"
12 preceding it with the word "Baby."

13 Q. Yes, I understand you use the
14 word partner phrase.

15 Are you aware of the word
16 "partner phrase" being defined in any
17 musicological literature?

18 A. I don't know of any. I mean, I
19 didn't use one to define it that way in
20 this report.

21 Q. So the answer is you're not
22 aware of musicological literature that
23 uses the "phrase partner" phrase?

24 A. I don't know if it uses the
25 phrase. But the concept of one phrase

1 JUDITH FINELL

2 being connected or musically related to
3 another is a very old concept.

4 Q. Okay. List any other cases in
5 which you have used the term "partner
6 phrase."

7 A. I don't remember.

8 Q. Do you recall ever having used
9 the phrase "partner phrase" in another
10 report?

11 A. Yes.

12 Q. You have no idea how many
13 times?

14 A. No.

15 Q. Would you be able to determine
16 the cases and the number of times in
17 which you have used the phrase "partner
18 phrase" in other cases?

19 A. No, I don't think my records
20 would go that far back. It's not
21 something I use very often. But I've
22 certainly recognized it in other musical
23 analyses. Not all of my analyses turn
24 into reports. So I really am not sure.

25 Q. You recall using the same

1 JUDITH FINELL

2 concept, correct?

3 A. Yes.

4 Q. So tell me what you recall.

5 What partner phrases do you remember in
6 your past?

7 A. I really don't. It's been many
8 years of doing this kind of work. And I
9 do many, many reports a year. So I
10 really -- I can't tell you, to be honest.

11 Q. How many, many reports a year
12 do you do?

13 A. Well, some are preliminary
14 reports, some are oral reports and some
15 are full reports. Should I combine all
16 of those?

17 Q. Yes, ma'am.

18 A. A few hundred.

19 Q. A few hundred?

20 A. Yes.

21 Q. And this is your full-time
22 living, correct?

23 A. That's right.

24 Q. So more than 500?

25 A. No, I don't think so.

JUDITH FINELL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. Under 500?

A. Yes.

Q. And those are just -- and so when you're doing those reports, let's, as a ballpark number, use 500; is that maybe a reasonable number?

A. Well, I should explain. Some of the reports -- we do in my firm a lot of consulting work that is not copyright infringement disputing. We work a lot with film and television companies on music that's being used, and advertising, I should say, that's being used in their products. So they require reports, also. So in those 500, I am also including that.

Q. Do your reports typically include two songs?

A. Often not.

Q. Sometimes just one song?

A. Yes.

Q. And how many of the reports that you do would involve two songs?

A. Probably 50 percent.

1 JUDITH FINELL

2 Q. Okay. So just doing the rough
3 math, if we're doing 500 reports, oral,
4 preliminary, full and the other work that
5 you're doing in a year, you're talking
6 about somewhere between 500 and 1000
7 songs a year that you're doing some
8 analysis on?

9 A. It could be quite a bit more.
10 Sometimes prior art research is involved.
11 Sometimes we're asked to determine if
12 something is like any other number of
13 several hundred songs.

14 Q. Okay.

15 A. So it's really too broad to
16 answer it with a number, I think.

17 Q. So we're actually talking about
18 the analysis that you go through could
19 involve several thousand songs each year,
20 correct?

21 A. It can, yes.

22 Q. And in the last two years, it
23 has involved several thousand songs each
24 year, correct?

25 A. The last year was a little

1 JUDITH FINELL

2 different from normal. So I would say
3 probably fewer in the last year because I
4 was focused on one major case for part of
5 that year. But normally, the volume is
6 pretty high, yes.

7 Q. And the major case you're
8 referring to is the Blurred Lines case?

9 A. Yes.

10 Q. In which you were the expert
11 for the Marvin Gaye estate?

12 A. Yes.

13 Q. In your mind, what is a
14 similarity between songs?

15 A. I can't answer that in the
16 abstract.

17 Q. Okay. You have to have two
18 songs to prepare or one song to look at
19 to determine similarity?

20 A. Well, if I am talking
21 similarity, it's a relationship. So I
22 would have to have at least two. It's a
23 comparative value.

24 Q. You said that you make a
25 preliminary determination of what

1 JUDITH FINELL

2 material is alike, correct?

3 A. Yes.

4 Q. And then you transcribe what's
5 alike?

6 A. If it's -- yes. It depends on
7 the likeness, if you will. Or if I feel
8 that it's not driven by similar unusual
9 features, then I may not make a
10 transcription.

11 I mean there is an appraisal or
12 evaluation process that's occurring while
13 the analysis is going on.

14 Q. In this case, what you
15 determined was "alike" were the words
16 "remind me" or "Baby, remind me,"
17 correct?

18 A. That was only the first
19 similarity that I heard when I studied
20 it. There were others that were more
21 convincing as -- I shouldn't say more
22 convincing, but that convinced me that
23 there was substantial similarity.

24 Q. The only portions of the song
25 that you transcribed were the portions

1 JUDITH FINELL

2 you thought sounded alike, correct?

3 A. Yes.

4 Q. Is there any formal agreement
5 on musicology practices?

6 MR. SANDERS: Object to the
7 form.

8 A. I don't understand.

9 Q. Is there any convention on
10 musicological practices?

11 MR. SANDERS: Object to form.

12 A. I don't understand your
13 question.

14 Q. Is there a how-to book on how a
15 musicologist goes about determining
16 similarity?

17 A. There may be. But it's more to
18 do with the educational background of a
19 musicologist. It's a discipline that was
20 developed in Germany, and was meant,
21 originally, to analyze classical music,
22 but it has been applied in the music
23 industry for all forms of music.

24 Q. All right. Let me ask that
25 again, because you started with "There

1 JUDITH FINELL

2 may be."

3 Is it correct that you are not
4 aware of a musicological treatise that
5 describes how the process of comparing
6 two songs should be done?

7 A. Oh, there are, there are some
8 written often by attorneys who have a
9 musical background, and are trying to
10 create a practical approach. But I
11 haven't read any of them.

12 Q. And you relied on no such
13 treatise in connection with this case?

14 A. Not at all.

15 Q. And you don't rely on any such
16 treatise in connection with any of your
17 cases?

18 A. No. Except for my education
19 which involved a lot of treatises, but
20 from the standpoint of musicology. But
21 not anything that's been recently done,
22 to arrive at or disabuse the concept of
23 substantial similarity.

24 Q. And you completed your formal
25 education in what year?

1 JUDITH FINELL

2 A. Well, my master's was
3 University of California at Berkeley in
4 1970. And since then, I have done many,
5 many years of lectures, attending
6 lectures, and copyright and musicology
7 CLE lectures, and given them myself and
8 done a lot of writing on topic.

9 Q. You've not had any formal
10 education or enrolled in any classes
11 since 1970 in connection with musicology?

12 A. That's right.

13 Q. And you do not have a Ph.D.?

14 A. No, I don't.

15 Q. And you're not affiliated with
16 the university as a professor?

17 A. No. I am a guest lecturer
18 quite often, but no.

19 Q. What's the purpose of
20 transposing two songs to the same key?

21 A. So that the notes can be
22 compared as being in the same context.

23 One of the processes of
24 comparing music to one another, musical,
25 works, is to compare what you call the

1 JUDITH FINELL

2 scale degrees. In other words, the
3 relation that each note has within its
4 own scale. So to do that, it's more
5 appropriate normally to transpose them
6 into the same key.

7 In other words, you can sing
8 Jingle Bells in the key of C, F, B-flat,
9 whatever key you wanted depending on your
10 vocal range, and it would still be Jingle
11 Bells.

12 The transposition process is
13 simply putting them both in the same key
14 so that difference is not a factor.

15 Q. In connection with your
16 musicological practice, do you make any
17 effort to distinguish between ideas or
18 musical building blocks or protectable
19 expression?

20 MR. SANDERS: Object to the
21 extent that it's calling for legal
22 conclusion.

23 A. Protectable expression is not a
24 musicological term. It's a legal term.

25 Q. So you don't conduct an

1 JUDITH FINELL

2 analysis into protectable expression,
3 correct?

4 A. Not with that -- not for the
5 word protectable, I don't.

6 Q. And you did not do so in this
7 case?

8 A. No, I was never asked to.

9 Q. Do you make an effort to
10 distinguish between ideas and musical
11 expression?

12 A. Yes.

13 Q. And what do you do?

14 A. Well, ideas would be more
15 either stylistic or genre related. And
16 sometimes music sounds alike because
17 that's what is shared between two musical
18 works.

19 I am more interested and
20 usually, my analysis in finding beyond
21 that is the actual content the same, are
22 the pitches the same, the rhythms.

23 I was blessed with perfect
24 pitch, and I listen to music in a way
25 that I hear very exact pitches in a

1 JUDITH FINELL

2 certain way that sort of drives my
3 analysis in that direction, but in fact,
4 that's really part of the musical
5 content.

6 Q. Do you make a comparison to see
7 if similarities between two works are
8 nontrivial?

9 MR. SANDERS: Same objection.

10 A. What do you mean by trivial? I
11 mean, by whose definition?

12 Q. As a musicologist, what do you
13 consider the word trivial to be?

14 A. I have never used that in any
15 report or analysis, so I don't know what
16 you mean. I mean, I understand what the
17 word means by definition. But I don't
18 understand what it means in this context.

19 Q. Is it important for a
20 musicologist to include an analysis of
21 similarities and differences in their
22 reports?

23 MR. SANDERS: Same objection.

24 A. I believe it's the role of a
25 musicologist to make clear, if there is a

JUDITH FINELL

relationship between the works, what are the elements that make the relationship exist.

And if there is not a relationship between the works, and I would say then, yes, the differences are more important.

But if the works sound related, and then upon analysis are proven to be related in their core musical properties, then I would focus on the relationship between them.

Q. When you're making a comparison, just in a general context, what aspects of the melody do you look at for similarities or differences?

A. Well, melody is defined as a sequence of pitches and rhythms, meaning duration. So I look at the pitches and the rhythms. Their placement in the bar has to do with their positioning, and that affects their rhythmic character, but basically, the pitches and the rhythms.

1 JUDITH FINELL

2 Q. Do you look at the harmonic
3 context in which a melody is presented?

4 A. Always.

5 Q. How?

6 A. Well, it depends on how the
7 music is being composed and what drives
8 it. Different pieces of music are
9 sometimes harmony driven where the melody
10 grows out of the harmony, and other times
11 melodically driven where the harmony
12 grows out of the melody.

13 So that's a determination that
14 my training would enable me to do.

15 But if it's a vocal work, as
16 opposed to purely instrumental work, the
17 melody line that's, say, for example,
18 sung by a singer, is it consonant with
19 the harmony that's supporting it or
20 dissonant.

21 In other words, is it, if it's
22 dissonant, then it needs to be resolved
23 in traditional music.

24 If it's consonant, then the
25 vocal line is somehow part of the

1 JUDITH FINELL

2 prevailing harmonic context.

3 Q. Is the quantity of similarity
4 important?

5 A. Sometimes. In what context?

6 Q. You tell me the context that
7 you're talking about.

8 A. What was your question?

9 Q. I asked if the quantity of the
10 similarity is important. Does it matter?

11 A. That's part of the factors that
12 go into my determining to what degree two
13 musical works are substantially similar.
14 But that's only part of it.

15 Q. Is a difference in key between
16 two works significant?

17 A. Only if it's in mode. If one
18 is in the major and one is in the minor
19 mode, that would be important. But if
20 one is in F-sharp major and the other one
21 is in C major, it wouldn't matter at all.

22 Except, I should say, unless
23 you're comparing recordings for
24 similarities. And that could impact how
25 it sounds in terms of the singing style,

JUDITH FINELL

et cetera.

In other words, certain keys will be favored by certain singers and all.

But eliminating that, the underlying music being in one key over another, as long as they are in the same mode, would not have an impact on the similarity.

Q. Is it a creative choice to use different keys in a musical work?

A. That's a good question. Partially. But it's partially because some music is written for certain people's voices, I think, in popular music. But there are some composers who write only in one key because they are more familiar with that key. I think it was in Irving Berlin who only wrote in F-sharp.

Q. You listened to the Connor and Paisley works multiple times?

A. Yes.

Q. And what key is Connor recorded

1 JUDITH FINELL

2 in?

3 A. I am sorry, I don't remember
4 now. I transposed everything into the
5 same key for my analysis. So it's been a
6 while since I listened to it.

7 Q. So you don't know?

8 A. The sheet music is the key of F
9 major, but I don't recall right now if
10 the recording itself was, no.

11 Q. Okay. And you're referring to
12 the Paisley sheet music?

13 A. That's right. I am sorry, did
14 you say Connor?

15 Q. I did say Connor.

16 A. Excuse me, I am sorry.

17 Q. You're referring to the sheet
18 music in Paisley to say that it's written
19 in F major?

20 A. The sheet music is. That
21 doesn't mean the recording is.

22 Q. And key for Connor is you don't
23 recall?

24 A. I don't recall.

25 Q. Do you recall if it was major

JUDITH FINELL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

or minor?

A. Yes. It's major. But my report might have told. I just don't recall without looking at my report. I usually do say what the keys are.

Q. How would you define the term color, in connection with musical work?

MR. SANDERS: Object to the form.

A. I don't understand what you mean.

Q. Did you ever use the word color in your reports?

A. Describing -- it's really an aural, meaning A-U-R-A-L description. In other words, a description of sound. Is that what you mean, a vocal color?

Q. I am talking about when you use the term color in musicological reports, how do you define it?

A. I almost never use it unless I'm being asked to evaluate recordings. It's more of a description of sound than it is of underlying music. But I should

1 JUDITH FINELL

2 qualify that, because sometimes I use
3 that when unusual cords are used, and I
4 will say that an extra note adds some
5 color. That's true. I do say that.

6 Q. What is cord progression?

7 A. It's the -- it's the pattern of
8 a series of cords progressing from one to
9 another.

10 Q. And from a musicological
11 perspective, when should you look at the
12 melody free from cord progression and
13 when should you look at it as part of the
14 cord progression?

15 MR. SANDERS: Object to form.

16 A. They are independent factors,
17 but they do interrelate. So you should
18 look at them both as they correlate with
19 one another and also individually.

20 Q. So in all cases you should
21 always look at how the cord progressions
22 are done?

23 MR. SANDERS: Object to form.

24 A. There is no always. It depends
25 on what I am looking at in the music.

1 JUDITH FINELL

2 What I am looking for. If the similarity
3 in the music isn't related directly to
4 the cords, than I won't focus on that.
5 It depends on what the similarity is, if
6 that's my assignment.

7 Q. In this case, you did not map
8 out the cord progressions of either song,
9 correct?

10 A. That's correct. Although the
11 cord progressions in the sheet music for
12 Paisley were roughly correct. But I did
13 not analyze them in-depth.

14 Q. And in your report, your full
15 report, Exhibit 1, you did the best job
16 that you could to map out anything that
17 you considered to be similar between the
18 two songs, correct?

19 A. I mapped out what I thought
20 were the most important similarities
21 between the two songs.

22 Q. Why didn't you map out the cord
23 progressions in Connor and compare those
24 to Paisley?

25 A. I didn't hear anything in

JUDITH FINELL

particular in either song's cord progressions. And it wasn't the reason why I believed they sounded similar, except in their vocal line in which they created dissonance against their cord progression. And I talked about that when I discussed appoggiatura.

Q. And in order to use the term appoggiatura and talk about dissonance, don't you have to know what cord is being resolved?

A. Yes.

Q. And when you're mapping those out, you did not map out the words in Paisley, correct?

A. I listened to the recording and I could hear the dissonance. I didn't need to map it out.

Q. You didn't map out the cords in Paisley, did you?

A. As I say, they were accurate enough in the sheet music. And I was really looking for the vocal line above the cord. It wasn't necessary to map it

1 JUDITH FINELL

2 out.

3 Q. In your report, you did not
4 make a comparison of the cords in Connor
5 versus the cords in Paisley, did you?

6 A. No, I did not.

7 Q. How do you claim or believe
8 that a lay listener picks out
9 similarities?

10 MR. SANDERS: Object to form.

11 A. You know, it's a broad
12 question, because it depends on the lay
13 listener's musical knowledge, musical
14 abilities and sensitivities. And the
15 population varies in that a great deal.
16 So I would say that it would be
17 impossible for me to know how a sampling
18 of, say, 100 lay listeners would respond
19 to music being similar or not similar.
20 But there is certain consistencies I have
21 seen.

22 Q. And you used the word
23 impossible, correct?

24 A. I am not sure if that's the
25 right word.

1 JUDITH FINELL

2 THE WITNESS: Could you read
3 that back, please?

4 MR. HARVEY: Madam Reporter, can
5 you confirm that she used the word
6 impossible in her answer?

7 (The reporter read back as
8 follows:

9 "ANSWER: "So I would say that
10 it would be impossible for me to know
11 how a sampling of, say, 100 lay
12 listeners would respond to music being
13 similar or not similar.")

14 A. May I correct myself?

15 Q. Would you like to correct
16 yourself?

17 A. I would like to, if you would
18 permit me to.

19 Yeah, I would say "impossible"
20 was a bit too strong of a word. But it
21 would be difficult for me to know rather
22 than just speculating how a sampling of
23 100 people who are considered lay
24 listeners would respond, because I would
25 not know anything about their own musical

1 JUDITH FINELL

2 background or knowledge.

3 Q. Does the use of syncopated
4 rhythm versus non-syncopated rhythm make
5 a difference in determining similarity to
6 you as a musicologist?

7 A. Well, everything is specific.
8 So syncopated rhythm is one similarity
9 that may or may not be found between two
10 pieces of music, but because syncopation
11 by itself is a disruption of a normal
12 pulse of a piece of music, if two pieces
13 of music use it in a similar way, that
14 would be one of the points of similarity,
15 but within a context.

16 Q. And if one work makes use of
17 syncopation and the other work makes use
18 of a word falling on a downbeat, that
19 would not be similar?

20 A. It depends on the context. Are
21 you talking about just the rhythm or what
22 notes they are using?

23 There is more to the music than
24 just the syncopation or the downbeat.
25 It's what are the pitches that are being

JUDITH FINELL

syncopated or used on the downbeat. How long does each one last? Are they setting -- are they setting lyrics to melodies. You know, there are a lot of other aspects occurring simultaneously. So it's hard to say if something would be similar or not just based on syncopation.

Q. What's a melisma?

A. A melisma describes a vocal technique in which one word or syllable is sung over multiple pitches.

Q. And an example given by Ms. Connor in her deposition was the famous song Hallelujah, where the word "Hallelujah" is sung over many different notes; is that an example of --

A. Are you talking about Handel's Hallelujah?

Q. Handel's Hallelujah, yes.

A. Well, the theme, or you might want to call it the hook of "Hallelujah" is not melismatic. It's basically, one pitch per syllable of the word Hallelujah, which is a four syllable

JUDITH FINELL

word.

That's a long classical work,
and there certainly parts of it where
there probably is melismatic sections.

Q. Probably, okay. And as a
musicologist, do you agree that it is not
unusual, in and of itself, for two songs
to have similar musical elements?

A. That's too general for me to
answer.

Q. Do you agree that it's not
unusual for musical works, in and of
itself, to have two different lyrical
elements?

A. Do you mean lyrics alone?

Q. Yes.

A. Some musical works share
lyrics, yes.

Q. So you would agree that it is
not unusual, in and of itself, that two
works would share lyrical elements?

A. It's hard for me to answer that
in the abstract.

Q. You do this for a living. You

1 JUDITH FINELL

2 compare songs, hundreds of songs each
3 year.

4 Do you agree that it is not
5 unusual, in and of itself, for two
6 musical works to have similar lyrical
7 elements?

8 MR. SANDERS: Object to form.

9 A. As I say, it's hard to answer
10 you in the abstract, because I see the
11 lyrics in a context of how long each
12 lyric is sung or spoken, the rhythms, in
13 other words. What notes those lyrics are
14 assigned to. What harmonies those lyrics
15 are supported by. It's a whole group of
16 elements that work together to create the
17 musical impression of one work over
18 another.

19 Q. How do you define the phrase or
20 the word hook?

21 A. Well, hook is really used in
22 popular music to define what you might
23 think of as one or more of the signature
24 phrases of a musical work. Sometimes
25 musical works have more than one. Vocal

JUDITH FINELL

works, often the hook is also the title lyrics of the song.

I usually use the Cyndi Lauper song "Girls Just Want to Have Fun," which is a hook of her song. And sometimes it's instrumental, and it can be a famous guitar melody or it could be a piano melody. It doesn't have to be vocal.

Q. Is hook defined in musicological literature that you consider to be definitive?

A. Well, it's defined in musicological literature that talks about popular musical genres. It's a term that is used -- it's a vernacular term that is used in the popular music industry.

You could say that Beethoven Fifth Symphony, the four note melody, G-G-G-E-flat is the hook of the melody, but I would say that that would be unusual in the academic world to describe that as Beethoven's hook.

Q. How do you pick what you consider to be the signature melodic

1 JUDITH FINELL

2 material of a song?

3 A. Can you repeat that, please?

4 Q. How do you pick what you
5 consider to be the signature melodic
6 material in a song?

7 A. You mean how do I define what
8 the hook would be of a song?

9 Q. Yes, ma'am. Well, excuse me,
10 is that what you consider a hook to be?

11 A. Yes, usually. But there is
12 sometimes more than one in a song.

13 Q. Okay. So how do you pick a
14 hook in a song?

15 A. Well, if it's a song with
16 words, as opposed to an instrumental
17 musical work, then often the hook is the
18 repeating phrase within a song. And I
19 would say a large percentage of the time
20 it's the same lyrics that are in the
21 title, or at least part of those lyrics
22 in the title. And it's usually used over
23 and over again as kind of an anchor to
24 the song.

25 Q. So it's usually the title?

1 JUDITH FINELL

2 A. In popular music, often it's
3 the title. Not usually. If I said
4 usually, I should have said the word
5 often.

6 Q. Does popular music include
7 country music?

8 A. Yes.

9 Q. Hip hop?

10 A. Yes.

11 Q. Rap?

12 A. Yes.

13 Q. Urban?

14 A. Yes.

15 Q. Jazz?

16 A. Well, jazz is kind of its own
17 genre in a way, but sometimes.

18 Q. Any other genres that you think
19 fall within the hook often being the
20 title?

21 A. Yeah, the American Songbook.
22 In other words, that is sometimes shown
23 in musical theatre, or not musical
24 theatre, in cabaret settings, et cetera.

25 Q. On a percentage basis, how

1 JUDITH FINELL

2 often do you pick the hook as the title
3 of the song?

4 A. Well, I don't pick it. The
5 composer picks it. I just recognize it.

6 Q. You recognize it.

7 Do you have any idea what the
8 Defendant songwriters or the performers
9 on the Paisley Remind Me responded when
10 asked what the hook of the Paisley Remind
11 Me was?

12 A. No, I do not.

13 Q. Have you read any depositions
14 in this case?

15 A. No.

16 Q. Have you had any deposition
17 testimony described to you, in this case?

18 A. I was -- I did have a brief
19 description of, I think it was the
20 Paisley deposition.

21 Q. And what description of the
22 Paisley deposition were you told?

23 A. I believe I was told that
24 Mr. Paisley said that he had never
25 written another song that sounded like

1 JUDITH FINELL

2 this. I am paraphrasing, but that's what
3 I recall the meaning of the sentence to
4 be.

5 Q. Who told you that?

6 A. Mr. Connor.

7 Q. But you haven't looked at his
8 transcript?

9 A. No, I have never have.

10 Q. Have you looked at Ms. Connor's
11 transcript?

12 A. No.

13 Q. Have you been told what the
14 theory of access is in this case?

15 A. I was told some background
16 information on that, yes, when I was
17 engaged.

18 Q. And what do you understand
19 access consisted of in this case?

20 A. As far as I remember -- and
21 this was over two years ago that I was
22 told this -- that Ms. Connor went to a
23 session that was meant to give young
24 artists an opportunity to be heard. I am
25 not sure if it was Sony sponsored or not,

1 JUDITH FINELL

2 but an event that enabled young artists
3 to showcase their work. And she sang her
4 song there, I believe. That's really all
5 I recall being told.

6 Q. If the writer of the song
7 identifies the hook differently than you,
8 who is correct?

9 A. If the writer of the song
10 identifies -- it would be -- I may hear
11 something based on the criteria I applied
12 to it. But I would be -- I mean, the
13 writer composed it. So I would show
14 respect for the writer.

15 But the truth is that, you
16 know, I may hear some other features that
17 are hooklike. And that's why I say there
18 is often more than one hook. Especially,
19 in instrumental music.

20 Q. So you're not really able to
21 say who is correct, are you, you versus
22 the writer of the song.

23 A. I do always defer to the writer
24 of the song. But today most writers of
25 popular music have very, very little

1 JUDITH FINELL

2 formal musical education, so I would
3 still trust my own evaluation of an
4 important phrase. And maybe the hook
5 won't be the word that's used, but it
6 will be an important phrase.

7 Q. Can we say that your
8 identification of a hook is more properly
9 called hooklike?

10 A. In what context?

11 Q. In the context of your attempt
12 to define a hook?

13 A. I don't understand your
14 question.

15 Q. Do you have any idea what the
16 musical education background is of
17 Mr. Paisley?

18 A. No, not at all.

19 Q. Or Mr. Lovelace?

20 A. No.

21 Q. Or Mr. DuBois?

22 A. No.

23 Q. But you defer to the writers of
24 the song about what the hook is?

25 A. Well, I know -- when a writer

1 JUDITH FINELL

2 says that, then I know that's what the
3 writer was thinking of. So if I don't
4 agree, I may say well, this is another
5 important phrase in the song. I mean,
6 just out of respect for the writer.

7 Q. Do -- so you described what you
8 understood to be allegations of access in
9 this case.

10 Do allegations of access make a
11 difference in your preparation of a
12 report?

13 A. Not at all.

14 Q. Do you make an assumption in
15 your report that there was access between
16 the Paisley song and the Connor song?

17 A. No, it doesn't -- it has no
18 impact on my musical analysis.

19 Q. So your work involves -- strike
20 that.

21 We talked earlier about the
22 hundreds of songs you listened to in
23 connection with your work each year.

24 I'll ask, as a listener of
25 music, do you listen to music going to

1 JUDITH FINELL

2 and from work, or listen to Pandora, or
3 listen to any musical library on a daily
4 basis or weekly basis?

5 MR. SANDERS: Object to form.

6 A. Yes, I do.

7 Q. How about on a daily basis, in
8 addition to the work that you're
9 performing for your business, how many
10 songs do you think you listen to each
11 day?

12 A. It depends on the day.
13 Basically, I work about 12 or 14 hours a
14 day. And almost all of those hours I am
15 spending analyzing and listening to
16 music. So sometimes unless I am going to
17 a performance of the opera or a symphony
18 or something, I am not necessarily
19 listening to music in those off hours.

20 Q. Let's say on a weekly basis and
21 in your off time, how many songs would
22 you listen to? I am just looking for a
23 blended average.

24 A. I have no idea.

25 Q. Well, if you had the radio on

1 JUDITH FINELL

2 for an hour, that might be 15 songs or
3 so?

4 A. Well --

5 MR. SANDERS: Object to form.

6 A. I listen to NPR, which is more
7 political and, you know, other kinds of
8 informational radio rather than musical
9 when I am driving.

10 Q. What kind of music do you
11 listen to for leisure or for your own
12 personal pleasure?

13 A. I have a wide variety. But my
14 background is as a classical, classically
15 trained musician. So I attend the
16 Metropolitan Opera, and the New York
17 Philharmonic and many concerts at
18 Carnegie Hall, but I am also very
19 interested in popular music and have been
20 for most of my life.

21 Q. Is it correct that
22 musicologists tend to specialize in one
23 genre of music versus others?

24 A. For their academic work, they
25 often do, as did I. That doesn't mean

1 JUDITH FINELL

2 that's what they remain in.

3 Q. So your academic work focused
4 on classical music, correct?

5 A. My graduate work focused on
6 classical musical analysis in theory.

7 My undergraduate was in piano
8 performance.

9 Q. Do you have any -- strike that.

10 A. I should explain. My degree,
11 my graduate degree is in musicology from
12 the University of California at Berkeley.
13 But the work that was required and taught
14 in order for me to conduct musicological
15 studies was analysis and theory. I
16 didn't explain it properly before.
17 Excuse me.

18 Q. Do you have any specialized
19 training in country music?

20 A. No. I receive requests, many,
21 many requests a year of all kinds of
22 genres. The genre of the musical sound
23 is really immaterial to my work. It is
24 pitches, rhythms, harmonies, musical
25 style and sound. And that's my

1 JUDITH FINELL

2 expertise. And it does not matter what
3 style the music is written in for me to
4 conduct a musical analysis whatsoever.

5 Q. So I am correct in stating that
6 you have no specialized experience or no
7 specialized training in country music?

8 A. I have years of experience in
9 country music. But it's not something
10 that was taught in the academic setting
11 where I obtained my formal degrees.

12 I've had many, many cases
13 involving country western music, as well
14 as hip hop and others.

15 Q. In your report, you list five
16 different cases in which you have been
17 engaged to provide a report, or
18 deposition testimony or trial testimony.
19 And then you list some testimony before
20 the copyright and royalty judges.

21 That's on Page 37 of your
22 report, correct?

23 A. Yes.

24 Q. And this engagement, because
25 you're listing other engagements, this

1 JUDITH FINELL

2 engagement is not listed, correct?

3 A. Right, that's correct.

4 Q. So this engagement for the
5 Remind Me case involves country music,
6 right?

7 A. Yes.

8 Q. For the five songs in which you
9 have identified as having been engaged as
10 an expert witness, none of those cases
11 involve country music, correct?

12 A. Well, over the four-year period
13 that this listed for testimony.

14 Q. In the last four years, none of
15 the cases in which you have been engaged
16 to provide expert witness testimony
17 involve country music, correct?

18 A. Testimony, that doesn't mean
19 that I haven't reported on many, many
20 cases of music that didn't end up in
21 testimony.

22 Q. Ms. Finell, please listen to my
23 question and please answer it.

24 In the last four years, you
25 have not been engaged to provide

1 JUDITH FINELL

2 testimony as an expert witness in any
3 other country music case, correct?

4 A. That's correct.

5 Q. Did anyone tell you about the
6 length of time between the supposed
7 access to the Connor work and the writing
8 of the Paisley work, in this case?

9 A. Could you repeat the question,
10 please?

11 (The reporter read back as
12 follows:

13 "QUESTION: Did anyone tell you
14 about the length of time between the
15 supposed access to the Connor work and
16 the writing of the Paisley work, in
17 this case?")

18 A. No.

19 Q. Does the length of time between
20 allegedly hearing a work and writing a
21 different work make a difference to you
22 as a musicologist?

23 MR. SANDERS: Object to the
24 form.

25 A. But it's not the musicologist

1 JUDITH FINELL

2 who would be writing it. So I don't
3 understand the question.

4 Q. Yes, ma'am. In terms of your
5 consideration of two works and making a
6 determination of whether you thought they
7 were substantially similar or not, does
8 the length of time between the supposed
9 access from the listening to the earlier
10 song and the writing of the later song,
11 does that make a difference to you?

12 MR. SANDERS: Object to form.

13 A. Not at all.

14 Q. As a musicologist, do you take
15 any consideration in what the lyrics in a
16 song are about?

17 A. Sometimes.

18 Q. Is it important to you as a
19 musicologist to consider whether two
20 songs express what they are about in
21 different ways?

22 MR. SANDERS: Object to form.

23 A. I don't quite understand what
24 you mean by "different ways."

25 Q. I am talking about in terms of

1 JUDITH FINELL

2 expressing the idea behind a song;
3 different ways, dissimilarities,
4 differences.

5 A. I really don't understand,
6 Mr. Harvey, what you mean by "different
7 ways."

8 Q. You would agree, based on your
9 understanding as a musicologist, that the
10 copyright law does not protect what the
11 lyrics of a song are about?

12 MR. SANDERS: Object as to a
13 legal conclusion.

14 A. Well, I am not a copyright
15 lawyer. But I do understand that ideas
16 are not protected, and that content or
17 expression of the ideas is.

18 Q. Okay. So it's your
19 understanding that the style of a
20 songwriters express is not protected, but
21 the particular expression of that style
22 is protected, correct?

23 MR. SANDERS: Object to form.

24 A. That's not accurate the way you
25 verbalized it. Excuse me.

1 JUDITH FINELL

2 Q. Do you think a songwriter's
3 style is something that he or she can
4 own?

5 MR. SANDERS: Object to form.

6 A. I don't understand your
7 question.

8 Q. From a musicological
9 perspective, is it possible that two
10 songwriters can write in a similar style
11 and not infringe one another?

12 MR. SANDERS: Object to form.

13 A. Yes.

14 Q. And you listened to Connor and
15 Paisley several times, correct?

16 A. Yes.

17 Q. And you have not read Connor's
18 deposition?

19 A. Never.

20 Q. She -- having listened to her
21 song -- Ms. Connor described her work as
22 being written in the first person at Page
23 93. Do you agree with that?

24 MR. SANDERS: Object to form.

25 Q. Do you agree that the Connor

1 JUDITH FINELL

2 song is written in the first person?

3 A. Do you mean the lyrics?

4 Q. Yes, ma'am. We are talking
5 about the lyrics.

6 A. Just one minute, please.

7 Q. Ms. Finell, you don't have an
8 opinion on that without referring to your
9 notes?

10 MR. SANDERS: Object to form.

11 A. I am a very precise person. I
12 would prefer to look at my documents.
13 It's in the first person. But it's also
14 verbalizing to a second person.

15 Q. And you agree that it's written
16 in the voice of a woman?

17 MR. SANDERS: Object to form.

18 A. You're not talking about
19 performed in the voice of a woman; you're
20 talking about the lyrics themselves?

21 Q. Yes, ma'am.

22 A. I don't see anything in the
23 lyrics that suggest gender.

24 Q. If Ms. Connor states that the
25 song, the song she wrote, was written in

1 JUDITH FINELL

2 the voice of a woman, you don't disagree
3 with her, do you?

4 MR. SANDERS: Object to form.

5 A. It was sung by a woman. I
6 understand that. But I don't see
7 anything in here that uses gender-related
8 words such as female, or girl or woman.

9 Q. If Ms. Connor testified that
10 her song that she wrote was written in
11 the voice of a woman, you do not disagree
12 with her, do you?

13 MR. SANDERS: Object to form.

14 A. It was written for the voice of
15 a woman, possibly. But not in the voice
16 of a woman. There is nothing technically
17 in this language that suggests the gender
18 of the writer of the song.

19 Q. Ms. Connor described her song
20 that she wrote as sentimental and sad, at
21 Pages 93 and 99.

22 Do you agree that the
23 expression of the idea of her song is
24 written as sentimental and sad?

25 MR. SANDERS: Object to form.

1 JUDITH FINELL

2 A. Are you talking about the
3 lyrics only, not the melody that sets the
4 lyrics?

5 Q. I am talking about the lyrics.

6 A. I would call it a regretful and
7 perhaps sentimental.

8 Q. Based on the lyrics as you've
9 reviewed them, the singer is singing
10 about someone who is not physically
11 present, who is not physically there,
12 correct?

13 MR. SANDERS: Object to form.

14 A. It's not necessarily true since
15 the singer is addressing another person
16 when the singer says things like "Baby,
17 Remind Me." "All I need is your touch to
18 Remind Me."

19 It's possible that the singer
20 is visualizing -- I should say the writer
21 is visualizing another person listening.

22 Q. How do you distinguish between
23 regretful and sad?

24 MR. SANDERS: Object to form.

25 A. Well, I am not a linguist. I

1 JUDITH FINELL

2 am a musicologist. But to me, regretful
3 means that you hope you can change
4 something or modify something. And sad
5 is an emotion in which perhaps you lost
6 that hope.

7 Q. Ms. Connor described the song
8 of grieving the loss of a relationship
9 that she had had, at Page 93.

10 Do you agree with that
11 characterization of the lyrics?

12 MR. SANDERS: Object to form.

13 A. Well, she's the person who
14 wrote it. So I would agree with it, yes.

15 Q. And you worked on thousands and
16 thousands of songs over your career.

17 Do you agree that the lyrical
18 idea of missing someone and the closeness
19 you once had is not original?

20 MR. SANDERS: Object to form and
21 legal conclusion.

22 A. Well, again, I am not a
23 literary expert in terms of themes, but
24 certainly that theme does resonate
25 throughout musical literature, and

1 JUDITH FINELL

2 theatrical literature and the rest of the
3 various art forms.

4 Q. So based on your long career,
5 and your experiences, and your knowledge
6 of the body of music that you studied and
7 the body of music that you have been
8 engaged in, you've heard many, many other
9 songs that have expressed the lyrical
10 idea of missing someone?

11 MR. SANDERS: Object to form.

12 A. Is there a question?

13 Q. Yes, ma'am. You would agree
14 that the lyrical idea of missing someone
15 and the closeness you once had is not
16 original to Ms. Connor?

17 MR. SANDERS: Object to form.

18 A. I would say that the concept is
19 not original to Ms. Connor.

20 Q. And you would agree, having
21 looked at her lyrics, that she is not
22 singing about a strong physical, sexual
23 relationship that the couple wants to
24 reenergize?

25 MR. SANDERS: Object to form.

JUDITH FINELL

A. Well, actually, I think she does. She talks about what could change it would be physicality of a kiss or a touch. And that would help remind, as she calls it, remind her. So actually, the physicality is the transformational focus.

Q. Is there anything in the Connor song that you think has a lyrical idea of a strong physical, sexual or passionate relationship?

MR. SANDERS: Object to form.

A. Is that for me?

Q. That's for you.

THE WITNESS: I'm sorry, could you repeat that?

(The reporter read back as follows:

"QUESTION: There anything in the Connor song that you think has a lyrical idea of a strong physical, sexual or passionate relationship?")

A. There is definitely that suggestion in the kissing and the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

touching. But it's not vulgar. But I would say that it does contain some suggestion of the physicality between the characters in the story that the song is outlining.

Q. Do you agree, Ms. Finell, that the expression of wanting to be reminded about some aspect of a relationship is a commonplace musical thing?

MR. SANDERS: Object to form.

A. I haven't done an investigation into it at all, or never conducted a study as such. But I would say I believe it is, yes.

Q. And you would agree that there are hundreds of ways to express missing something in a relationship, correct?

MR. SANDERS: Object to form.

A. Are you talking about with lyrics or with music?

Q. I am talking about with lyrics in a song, you would agree that there are hundreds of ways expressing that idea?

MR. SANDERS: Same objection.

1 JUDITH FINELL

2 A. I don't know if there are
3 hundreds of ways. I haven't conducted a
4 study. I would be just guessing.

5 Q. And the study you would have to
6 conduct would be an extensive prior art
7 search?

8 A. To answer the question you just
9 asked me, I would have to do a search,
10 yes.

11 Q. Is a prior art search something
12 that you generally conduct in connection
13 with an engagement?

14 A. It depends on the nature of the
15 engagement and the nature of the musical
16 relationships that I find.

17 Q. If you aren't engaged to
18 conduct a prior art search, you don't do
19 it, correct?

20 A. It's not quite that simple. I
21 often recommend that I do it. And my
22 recommendations are often followed.

23 But in this case, the way in
24 which the similarities combine were such
25 that I did not feel that there would be

JUDITH FINELL

prior art found that would have much more of a resemblance than just a random use of words like "remind me" in a fragmentary way rather than the exact way that they are set with all of the melodic characteristics that I found between the two songs.

Q. Ms. Finell, in Ms. Connor's deposition, we provided her records from the U.S. Copyright Office showing hundreds of songs with the title "Remind Me" or the words "remind me" in the title.

Did anyone ever mention that to you?

A. No.

Q. Are you aware of any other songs in the universe of the world, in the history of the world, other than Paisley and Connor, that have "Remind Me" as a title?

A. I haven't done that search, so the answer is I can't substantiate that. But I would think that on a random basis,

1 JUDITH FINELL

2 one would find other songs. Maybe not in
3 the title, but within the song that have
4 the words, either the exact words "remind
5 me" or something meaning that.

6 Q. And you know how to find
7 similarly titled songs, but you didn't do
8 so in this case?

9 A. No, because I did not expect to
10 find all of the combined characteristics
11 in any other song.

12 Q. Is it your claim, ma'am, that
13 prior art requires a combination of every
14 single similar element in order to be
15 considered prior art?

16 A. It may be a legal conclusion,
17 but my experience is if you have eight or
18 nine similar features, and the prior art
19 only contains one or two of them, that
20 wouldn't be particularly valid, unless
21 those were the most unusual, unique
22 features.

23 But mostly, if you have a large
24 combination of similar features, as you
25 do here, and it's repeatedly used

JUDITH FINELL

1
2 throughout both songs to become the, in
3 essence, the glue of the song that
4 creates the coherence of the song, I
5 would have to find those combined, at
6 least, in a fairly sufficient quantity in
7 other songs to be reasonable prior art.

8 Q. You didn't look in this case?

9 A. No. And nor did I expect to
10 find it.

11 Q. In Ms. Connor's deposition, she
12 was given information from Websites
13 identifying thousands of songs that have
14 the words "remind me" in the lyrics.

15 Did anyone tell you that that
16 is out there in the world?

17 A. No. You're the first one to
18 tell me that.

19 Q. You know how to find thousands
20 of songs containing the lyrics "remind
21 me," don't you?

22 MR. SANDERS: Object to form.

23 A. I don't know if there are
24 thousands of songs, sir. But I do know
25 how to look for them.

1 JUDITH FINELL

2 Q. You have a database that would
3 give you that information, correct?

4 A. I could find them if I needed
5 to. But I don't know how many I would
6 find and how many would apply.

7 Q. Did you the Plaintiff's counsel
8 in this case that you often conduct a
9 prior art search?

10 A. We did discuss it. I didn't
11 really tell them, one way or the other.
12 We did discuss what a prior art search
13 would probably yield.

14 Q. Ms. Connor described the
15 Paisley work as being about a passionate
16 physical experience, on Page 191.

17 Do you agree with the lyrics of
18 Paisley; do you agree with that?

19 MR. SANDERS: Object to form.

20 A. I would say so.

21 Q. And the Paisley work is a
22 conversation between a man and a woman?

23 A. It's a duet.

24 Q. It's a duet?

25 A. Yes.

1 JUDITH FINELL

2 Q. Connor is not a duet?

3 A. That's an element of
4 arrangement. Whether or not you split a
5 song between one or two singers is an
6 arrangement element. It's not the core
7 of the underlying work.

8 Q. In Ms. Connor's deposition, she
9 agreed that for her song to be a duet,
10 she would have to rewrite it.

11 Do you agree with that?

12 MR. SANDERS: Object to form.

13 A. She might have to rewrite some
14 of the lyrics. But she might be able to
15 share them between the two singers in a
16 duet. A duet is an arrangement decision.

17 Q. What is a call and response?

18 A. That, there are two ways to
19 describe it in a sense that in music
20 there can be a theme that ends in a kind
21 of question sense, meaning it doesn't end
22 on, technically in the final position of
23 the music such as the tonic or another
24 settling position at the end of the
25 phrase.

1 JUDITH FINELL

2 And then it's responded to,
3 either melodically or harmonically or
4 both with what would be the resolution of
5 that question into an answer. And it's
6 sometimes called call and response.

7 But the other use of call and
8 response is a compositional structural
9 feature. For example, in a lot of
10 religious gospel music, it came out of
11 that call and response structure in which
12 a singer or the reverend from the stage
13 would call out some kind of religious
14 statement, and the audience or the
15 congregants may call back hallelujah.
16 And it goes back and forth like that.
17 But it has both musical characteristics,
18 as I described, as well as performance
19 characteristics.

20 Q. Do you agree that the Paisley
21 work is a call and response?

22 A. Well, no, it's a duet. A call
23 and response -- I don't know, I haven't
24 thought of it as a call and response.
25 It's a duet.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

Q. If you look at the words of Paisley, where the male sings part of the verse and the female responds "Remind me," or the Underwood verse, where she's singing, and she makes a statement and Brad Paisley says "Remind me," do you agree that that's a call and response?

A. It could be seen that way, but I don't know, I didn't look at it as a call and response structure.

Q. Well, looking at it right now, would you agree that it's written as a call and response structure?

MR. SANDERS: Object to form.

A. I would have to spend a little time on it to look at it that way.

Q. Do you need to look at the lyrics to do that or you need to look at the sheet music?

A. Well, if you want to play the recording, I could do it that way. That would help me understand it, too.

Q. Maybe we can do that on a lunch break or something along those lines.

1 JUDITH FINELL

2 A. I mean, I understand that it's
3 structured that way in the sheet music.
4 It says female and male, and there's an
5 alternation between the two singers. But
6 I really saw it more as a duet.

7 Q. Do you agree that Connor and
8 Paisley express the overall lyrical idea
9 in two different ways?

10 MR. SANDERS: Object to form.

11 A. No, because they expressed it
12 musically in similar ways.

13 Q. I am asking you about lyrics
14 right now, Ms. Finell.

15 Do you agree that they express
16 the overall lyrical idea in two different
17 ways?

18 MR. SANDERS: Object to form.

19 A. I would say they are pretty
20 closely related. Both of them talk about
21 remembering through physical contact.
22 That to me is parallel. The level of,
23 the depth of the sexuality is not an
24 issue. The transformative action was the
25 physical contact.

1 JUDITH FINELL

2 Q. So the depth of sexuality is
3 not an issue?

4 A. Well, the Paisley song has, you
5 might say, less steer implications than
6 the Connor song. But both of them, the
7 transformative moment is remembering
8 through the physicality.

9 Q. In your study of musicology and
10 over your career, are you aware of any
11 writer or composer borrowing from
12 themselves using elements that they have
13 written in the past?

14 A. Yes.

15 Q. And you're aware of situations
16 where composers have reused elements from
17 their earlier works?

18 A. Oh, yes.

19 Q. Can you give me some examples
20 of that?

21 A. I can only give you general
22 ones. To validate it, I would have to do
23 some research.

24 But certainly, Mozart is known
25 for that. Many of the prolific classical

JUDITH FINELL

composers, not only borrowed from themselves but from one another and wrote variations on one another's works. Sometimes as a attribute. But they started with the other work and then wrote extensions of the work musically.

Q. Would it be accurate to call that self-borrowing?

A. I haven't heard it used, but it could be, yes.

Q. Well, when a writer or composer borrows from its earlier works, what do you call it?

A. Borrowing.

Q. Borrowing from myself?

A. I understand the meaning. I just never heard it used in literature in that way.

Q. Does musical literature discuss self-borrowing?

A. Oh, of course. But as I say, I've mostly been exposed to it in the classical sense. But certainly, it's the same musical mind. So the idea -- it's

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

part of that particular composer's style
or signature, if you will, sometimes.

Q. Other than the Paisley "Remind
Me," can you identify any work that Brad
Paisley wrote or cowrote prior to 2011?

A. No, I really couldn't without
investigating.

Q. And you didn't go look at the
copyright office records to look that up?

A. No.

Q. Do you have any idea how many
albums Brad Paisley had released prior to
2011?

A. I don't. I mean, I know he's
very successful. But I don't really
know, no.

Q. Would you describe -- let me
finish this part.

Do you know how many songs he
had written prior to 2011?

A. No.

Q. Or cowritten?

A. Not at all.

Q. What about either Mr. DuBois or

1 JUDITH FINELL

2 Mr. Lovelace, are you aware of how many
3 songs either of them had written or
4 cowritten prior to 2011?

5 A. Not at all.

6 Q. When Mr. Paisley writes with
7 Mr. Lovelace and Mr. DuBois, do you have
8 any idea of who writes the music?

9 A. No. I don't know their
10 process.

11 Q. What have you done, if
12 anything, to consider or to eliminate
13 self-borrowing by Paisley in this case?

14 MR. SANDERS: Object to form.

15 A. I don't understand your
16 question.

17 Q. Have you done anything to
18 eliminate the possibility of
19 self-borrowing by Brad Paisley in this
20 case?

21 A. Is your question did he write
22 an earlier song that resembled "Remind
23 Me"?

24 I don't quite understand what
25 you're asking.

1 JUDITH FINELL

2 MR. HARVEY: Read the question
3 back, please.

4 (The reporter read back as
5 follows:

6 "QUESTION: Have you done
7 anything to eliminate the possibility
8 of self-borrowing by Brad Paisley in
9 this case?")

10 MR. SANDERS: Same objection.

11 A. I don't understand your
12 question.

13 Q. Yes, ma'am, I think you do.

14 Let me ask you this way. Did
15 you do anything in this case, in your
16 engagement, to eliminate the possibility
17 of self-borrowing by Brad Paisley in the
18 Paisley "Remind Me"?

19 MR. SANDERS: Same objection.

20 A. Are you saying did I compare it
21 to his earlier works? I don't understand
22 the point of the question.

23 Q. Did you do anything -- ma'am,
24 did you do anything to eliminate the
25 possibility of self-borrowing by Brad

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

Paisley in the Paisley "Remind Me"?

MR. SANDERS: Same objection.

A. The only thing that I would be
able to do is compare it to his earlier
works. So in that sense, no, I did not.

(Off the record.)

(Time noted: 12:34 p.m.)

(Lunch recess taken.)

JUDITH FINELL

A F T E R N O O N S E S S I O N

(Time noted: 1:38 p.m.)

EXAMINATION BY MR. HARVEY (Continued):

Q. Ms. Finell, we are back after
the lunch break.

Are you ready to get started?

A. Yes.

Q. If a composer never heard the
music of a song that is allegedly
infringed, is copying possible?

MR. SANDERS: Object to the
form.

Q. Let me straighten that out. If
a composer never heard the melody of an
allegedly infringed song, is copying
possible?

MR. SANDERS: Object to the
form.

A. It depends on what might be
copied. The melody is only one element.

Q. Okay. Then let me put it this
way. If the composer never heard the
melody of an allegedly infringed song, is

1 JUDITH FINELL

2 copying of the melody possible?

3 MR. SANDERS: Object to the
4 form.

5 A. No, I wouldn't be -- maybe it
6 wouldn't be possible to copy that melody,
7 but maybe both melodies relate to
8 something else. It's really just in
9 theory, but it would be unlikely. I will
10 say it that way.

11 Q. So both melodies may have been
12 copied from some prior work, correct?

13 A. I am just talking in the
14 abstract, but could be, yeah.

15 Q. Assume, if you will, that none
16 of the melodic similarities in the
17 Paisley work are the result of copying;
18 what does that do to your opinions?

19 MR. SANDERS: Object to the
20 form.

21 A. Excuse me, can you explain what
22 you mean, please.

23 Q. I can restate it.

24 A. Thank you.

25 Q. I don't believe that the

1 JUDITH FINELL

2 question requires an explanation.

3 Assume that none of the melodic
4 similarities are the result of copying;
5 what does that do to your opinions in
6 your report?

7 MR. SANDERS: Object to the
8 form.

9 A. The similarities would still be
10 there. It wouldn't change the
11 similarities. I might not know the
12 source or the reason driving the
13 similarities, but it wouldn't change the
14 finding of similarity at all.

15 Q. Would it change your finding of
16 copying?

17 A. I didn't find copying. I found
18 similarities.

19 Q. In your preliminary report that
20 you prepared in March of 2013, or at
21 least it's dated March of 2013 that we've
22 seen for the first time today, prior to
23 that report being prepared and finalized,
24 how many times had you listened to the
25 Paisley and the Connor songs?

1 JUDITH FINELL

2 A. I don't remember. It was too
3 long ago.

4 Q. Well, more than 10, more than
5 20?

6 A. Before I wrote my preliminary
7 report, I don't know. It takes many
8 listenings to transcribe music, so I
9 don't know really how many are required.

10 Q. Well, in your career as a
11 musicologist, many is more than 10, more
12 than 20, in order to prepare a
13 preliminary report that you did in this
14 case?

15 A. It's probably somewhere between
16 10 and 20. Not the entirety of the
17 songs, but portions that I had already
18 isolated as similar.

19 Q. So you listened to either all
20 or portions of both songs, somewhere
21 between 10 and 20 times, before you
22 prepared the preliminary report?

23 A. Yes, but in that process, a
24 transcription is being prepared. So then
25 I start to rely on my transcriptions

1 JUDITH FINELL

2 instead of the listening process.

3 Q. If you will, take a look at
4 your preliminary report, and tell me if
5 the term appoggiatura is found in that
6 report?

7 A. It is not.

8 Q. Would you agree that it is
9 possible that there are some elements
10 that you have said that are similar
11 between the Connor work and the Paisley
12 work that are, in fact, contained in
13 Paisley works written prior to Connor's
14 2008 song?

15 MR. SANDERS: Object to form.

16 A. I would just be speculating. I
17 don't know any other Paisley works.

18 Q. You don't know because you
19 didn't look?

20 A. I am not -- I wasn't asked to
21 look and I am not aware of them.

22 If you gave me the titles, I
23 may have heard some of them. But I don't
24 have a diskography of Mr. Paisley's work
25 available to me in this meeting today.

1 JUDITH FINELL

2 Q. Would you agree that it's
3 possible that some elements that you said
4 are similar between Paisley and Connor
5 are, in fact, contained in other Paisley
6 songs written in 2008?

7 MR. SANDERS: Object to form.

8 A. Yes, it's possible.

9 Q. Can you tell me how the Connor
10 song is structured?

11 MR. SANDERS: Object to form.

12 A. Yes. It's an alternation of
13 verse and three choruses. It has a
14 bridge, a very short bridge section, also
15 before the last chorus.

16 Q. I am going to hand you a set of
17 lyrics that has the Connor "Remind Me" on
18 the left side and the Paisley "Remind Me"
19 on the right side.

20 MR. HARVEY: And I will ask the
21 court reporter to mark that as the
22 next Exhibit, please.

23 [The side by side comparison of
24 the lyrics of Connor and Paisley
25 songs, was hereby marked as

JUDITH FINELL

Defendants' Exhibit 5 for
identification, as of this date.]

Q. Now, in your notebook, you have
a copy of the lyrics for Connor "Remind
Me" that she had prepared and supplied to
you by her counsel, correct?

A. Yes.

Q. And you have a set of lyrics
in, that were prepared by someone about
the Paisley "Remind Me" in your notebook,
correct?

A. Yes. I don't remember who
prepared the "Remind Me" lyrics by
Connor.

It does, at the bottom, say
"Words and music by Lizza Connor." I
really don't know the source of that. I
was just sent this by the client.

Q. All right. And then, what you
have there for the lyrics of Paisley
"Remind Me," you're not sure who prepared
that, correct?

A. That's correct. I think it
tells right here lyrics mode. It gives a

1 JUDITH FINELL

2 source right in the midst of the lyrics
3 that I received.

4 Q. All right.

5 MR. HARVEY: And I don't think,
6 Mr. Sanders, that we got a copy of
7 that set of lyrics. So we'll get a
8 copy of that on a break.

9 MR. SANDERS: Okay.

10 Q. Anyway, let's start, please,
11 with what I had handed to you as Exhibit
12 number 5, which is a side by side of the
13 lyrics of Connor and Paisley's two songs.

14 So let me ask about the -- and
15 you've listened to the Connor song many
16 times.

17 So in terms of the Connor
18 structure, it starts with an intro,
19 correct?

20 A. There is a brief intro before
21 the words start; is that what you mean?

22 Q. Yes, ma'am.

23 A. It's been a while, but I
24 believe there is a short guitar intro.

25 Q. Well, you listened --

1 JUDITH FINELL

2 A. I would have to listen to it
3 now to verify that.

4 Q. You listened to the two songs
5 in the last week, didn't you?

6 A. Mostly I studied my report.

7 Q. Did you listen to the two songs
8 in the last week?

9 A. Yes.

10 Q. Thank you. So in the Connor
11 song, starts with an intro, correct?

12 A. I believe it does, but I would
13 prefer to listen to it again if you're
14 going to ask technical questions about
15 it.

16 Q. I'm not trying to trick you. I
17 am asking you about a song that you've
18 listened to in the last week.

19 It starts with an intro and
20 then leads into verse 1, correct?

21 A. I believe so.

22 Q. I am asking about the structure
23 of the Connor song now, Ms. Finell.

24 So you go from intro to verse
25 1, and then to the first chorus, correct?

1 JUDITH FINELL

2 A. Yes.

3 Q. And then it goes to verse 2,
4 and the second chorus, correct?

5 A. I think there is -- the second
6 chorus, yes, you're right.

7 Q. And then there is a bridge in
8 her song?

9 A. In the Connor, mm-hmm.

10 Q. Yes. And then there is a
11 partial chorus at the end of the song?

12 A. Mm-hmm, yes.

13 Q. Is that correct?

14 Now, you made no musicological
15 conclusion that the Connor structure is
16 original or unique, did you?

17 A. No.

18 MR. SANDERS: Object to the
19 form.

20 Q. You made no musicological
21 conclusion that the Connor structure is
22 copyrightable, did you?

23 MR. SANDERS: Object to the
24 form. Legal conclusion.

25 A. There are structural elements

1 JUDITH FINELL

2 to it that don't have to do with the
3 alternation of verse and chorus that I
4 did point out in my report. And those
5 are structural, so -- and some of them
6 are unusual.

7 But if you're talking about
8 what you just recited as the alternation
9 between verse and chorus, no, I did not
10 give an opinion on that.

11 Q. What structurally did you find
12 to be unique or original about the Connor
13 song?

14 MR. SANDERS: Object to form.

15 A. The way in which the chorus is
16 composed of two side by side partner
17 phrases and then -- I am sorry, not
18 partners -- phrase sets, consecutively,
19 and then for the sixth phrase of the same
20 chorus, there is a partner phrase, which
21 is the "Baby, remind me" phrase in
22 Connor. And that's pretty consistent
23 throughout Connor.

24 Q. So what you're referring to --

25 A. And that's structural in

1 JUDITH FINELL

2 nature.

3 Q. So what you're referring to on
4 the chorus is where she has two sentences
5 or lines back to back, "All it takes is
6 one kiss to remind me. All I need is
7 your touch to remind me." Correct?

8 A. Yes.

9 Q. And you think that is a unique
10 structural device that Ms. Connor
11 invented?

12 MR. SANDERS: Object to form.

13 A. I haven't investigated. But I
14 doubt that she invented it, but it is
15 distinctive in her song.

16 Q. So you think there is a prior
17 art that would show that other writers
18 have used back-to-back uses of a title in
19 sentences like that?

20 MR. SANDERS: Object to form.

21 A. I don't know if they used a
22 title in sentences like that. But
23 certainly, phrase A and B, B being a
24 variation of A, is not unusual.

25 Q. Okay. And in Paisley, the

1 JUDITH FINELL

2 phrases are not back to back, correct?

3 MR. SANDERS: Object to form.

4 Q. Excuse me, in Paisley, they are
5 not structured the same way as in Connor?

6 MR. SANDERS: Object to form.

7 A. I see them as the same
8 function, but they are not immediately
9 consecutive.

10 I need to look at my report to
11 give you a little more detail on that, if
12 you would allow me.

13 Q. I am not here to ask you to
14 read your report, ma'am. Because you
15 read your report to prepare for the
16 deposition, correct?

17 A. Yes.

18 Q. Okay.

19 A. But I would like to check
20 something that isn't clear in this
21 document.

22 Q. You want to check --

23 A. About the structure.

24 Q. Let me proceed on, because I'm
25 not asking you questions about structure

1 JUDITH FINELL

2 on this.

3 Can you tell me how the Paisley
4 song is structured?

5 A. Yes. But I really would -- I
6 would want to refer to my report so that
7 I'm consistent in it.

8 Q. Well, let me ask you questions
9 without you referring to your report, and
10 then we can see if your memory and your
11 testimony today is consistent with your
12 report.

13 So tell me the structure of the
14 Paisley song?

15 A. Well, the Paisley song is also
16 an alternation of verses and choruses.

17 It also has an interlude,
18 instrumental interlude that isn't
19 contained in the Connor song.

20 It also has a long, fairly
21 lengthy introductory section.

22 But if I could -- if I need
23 more detail, I did not memorize my
24 report. I wasn't told I needed to for
25 today.

1 JUDITH FINELL

2 Q. Nobody told you you need to
3 memorize your report, ma'am.

4 So on the Paisley structure, if
5 you will, just walk through it with me.
6 It starts off with, you said, a lengthy
7 intro and then leads into verse 1?

8 A. I would like to look at the
9 sheet music. This is only words. I
10 would need to look at the sheet music.

11 Q. Sure.

12 A. It's not represented in this.

13 Q. Feel free to look at what you
14 annotated as Exhibit number 2, the sheet
15 music for the Paisley "Remind Me."

16 A. Thank you.

17 Q. Let's have you look at Exhibit
18 2 that's marked so we have no
19 disagreement about what you're looking
20 at.

21 A. I don't know where that is.
22 Thank you.

23 Q. So the Paisley starts with a
24 lengthy intro and leads into verse 1?

25 A. Lengthy is a relative term.

1 JUDITH FINELL

2 Q. Lengthy is the term you used a
3 second ago.

4 Do you agree it's a lengthy
5 intro?

6 A. You're right. It's basically
7 eight bars.

8 Q. Okay. Do you think that's
9 lengthy or not?

10 MR. SANDERS: Object to the
11 form.

12 A. It's more lengthy than the
13 Connor introduction is, what I meant by
14 lengthy.

15 Q. Is it a significant structural
16 device to use an eight bar intro for a
17 country song?

18 A. It's very common.

19 Q. Common. So you have an intro
20 that leads into verse 1, correct?

21 A. Yes.

22 Q. And then it goes to chorus 1,
23 verse 2, chorus 2?

24 A. Chorus 1 begins on Page 2 of
25 the sheet music. And then verse 2 begins

1 JUDITH FINELL

2 on Page 4 of the sheet music. Chorus 2
3 begins on Page 4 of the sheet music.

4 Q. And then after chorus 2, there
5 is a bridge?

6 A. I'm not sure if it's a bridge.
7 I didn't -- I did not -- I did mark an
8 interlude, if that's what you mean by a
9 bridge. I am not sure where you're
10 looking.

11 Q. And then there is a guitar
12 solo. Do you remember that from the
13 song?

14 A. No. I did not focus on that.
15 I don't remember.

16 But the interlude section has
17 some pretty pronounced instrumental parts
18 in it. But I really need to listen to it
19 again to answer that.

20 Q. On the Exhibit 5, and it's
21 recorded, the times on the song. So
22 we've got -- it goes from intro to verse
23 1 to chorus 1, verse 2 to chorus 2, and
24 then a bridge and a guitar solo?

25 A. I don't know who wrote those.

1 JUDITH FINELL

2 I have never seen this document.

3 (Off the record.)

4 Q. Ms. Finell, having listened to
5 the Paisley "Remind Me" song multiple
6 times, including a few times in the last
7 week, does the Connor song include a
8 guitar solo?

9 A. No, it doesn't.

10 Q. Does Paisley include a guitar
11 solo?

12 A. I believe it does. But I have
13 to listen. I note it's noted here on the
14 Exhibit 5, but I never used Exhibit 5 or
15 seen it before today.

16 So according to whoever
17 prepared that, there is one. That
18 doesn't mean I agree with that.

19 Q. Are you saying, Ms. Finell,
20 that having listened to the song multiple
21 times, you don't recall a Paisley guitar
22 solo in his song?

23 A. Well, I didn't note it, and I
24 don't recall whether or not there is one
25 in between, before chorus 3.

1 JUDITH FINELL

2 Isn't that where you're
3 referring to?

4 Q. If the -- yes, ma'am. The
5 guitar solo that follows --

6 A. I can see it on the sheet music
7 for 4 bars, after the voice stops. But
8 that's not very long. And I am not sure
9 if that's representative. Usually sheet
10 music isn't representative of solo parts.

11 Q. Does the Connor song include an
12 outro or a coda?

13 A. Pardon?

14 Q. Does the Connor song include or
15 end with an outro or a coda?

16 A. I don't understand your
17 question. I know what outro means. But
18 what was your other word?

19 Q. Or coda?

20 A. Or coda, C-O-D-A?

21 Q. Yes, ma'am.

22 A. Yes.

23 Q. You're saying Connor ends with
24 an outro?

25 A. Connor, sorry, I was a little

1 JUDITH FINELL

2 distracted, because I didn't understand
3 the word you used.

4 I thought you were talking
5 about Paisley. Connor does not. Not in
6 the copyright version of it.

7 Q. Not in the deposit copy that's
8 the subject of this lawsuit?

9 MR. WARNOCK: Can you ask that
10 again Robb, because I think the record
11 got jumbled up.

12 Q. Does the Connor song end with
13 an outro or coda?

14 A. I don't believe it does, no.

15 Q. It does not, does it?

16 A. I don't believe it does.

17 Q. Does the Paisley song end with
18 an outro or a coda?

19 A. Yes.

20 Q. Is that a significant
21 structural difference between the two
22 songs?

23 MR. SANDERS: Object to form.

24 A. It's a difference, but it
25 wouldn't impact their similarity, in my

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

opinion.

Q. Because it's not similar,
right?

A. No. It wouldn't impact it
because I'm looking at the content that's
contained within all of those sections,
not whether or not they have sections.

Q. Because you're looking at
similarities, not differences, correct?

A. No, because I don't consider
the architecture of the song to be a
determining factor in two songs that are
written in a very common structure, by
itself.

Q. Did you make any musicological
conclusion that the Paisley structure is
unique or original?

MR. SANDERS: Object to form.

A. Not at all. I don't think it
is.

Q. Does Paisley fade out?

A. That's a recording question,
not an underlying musical question. It's
a matter of whether or not they soften

1 JUDITH FINELL

2 the sounds as it ends, and I don't
3 remember. But it wouldn't affect the
4 underlying music, whether it fades out or
5 not.

6 Q. On the deposit copy of Paisley
7 that you've listened to numerous times
8 and was provided a copy by counsel --

9 MR. SANDERS: You mean Paisley
10 or Connor?

11 MR. HARVEY: Excuse me.

12 Q. On the deposit copy of Paisley
13 that was provided to you by Plaintiff's
14 counsel, does that end with a fade-out?

15 A. I don't recall. It wouldn't
16 have been relevant to my analysis at all.
17 I never said that anyone copied someone's
18 fade-out.

19 Q. Is the number of measures of
20 verses -- is the number of the measures
21 of verses different in the two songs?

22 A. I haven't counted them. But
23 the Paisley song is longer than the
24 Connor song.

25 Q. Is the number of measures in

1 JUDITH FINELL

2 the chorus of Connor and Paisley
3 different?

4 A. I haven't compared them in
5 terms of how many bars they have.

6 Q. Because your focus was on the
7 music and lyrics "remind me"?

8 A. My focus was on what made them
9 resemble one another, and the number of
10 bars or other kinds of elements,
11 structural elements like that didn't
12 influence what rose, in my thoughts, in
13 terms of similarity.

14 Q. Is the number of measures
15 structural in musicology?

16 A. Yes, it is.

17 Q. And is the number of measures a
18 significant structural element?

19 MR. SANDERS: Object to form.

20 Q. In songs?

21 A. It's part of the architecture
22 of the song. It's like saying is the
23 number of chapters significant in a book,
24 but what matters is what's happening in
25 the chapters, not how many chapters there

1 JUDITH FINELL

2 are normally when you're comparing two
3 novels, for example.

4 Q. You have used the term "partner
5 phrase" several times.

6 Is there any academic
7 literature where the phrase "partner
8 phrase" is used that you can identify?

9 MR. SANDERS: Object to form.

10 A. The concept of phrases relating
11 to one another melodically or lyrically
12 or in some way one echoing another is a
13 common analytical observation. But the
14 partner, the use of that term, I am not
15 sure. I don't recall.

16 Q. The phrase "partner phrase," is
17 that something of your invention?

18 A. It's not my invention. But I
19 honestly don't know, I can't recall any
20 particular article I've read using that.

21 Q. Can you identify any
22 musicological literature that uses the
23 term "partner phrase"?

24 MR. SANDERS: Object to form.

25 A. I cannot recall.

1 JUDITH FINELL

2 Q. In Connor, explain to me what
3 it is you call the partner phrase?

4 A. The partner phrase in Connor is
5 the phrase that echos the hook, and
6 actually is part of the hook, but it's
7 the part that wherever the music uses the
8 lyrics "Baby, remind me," it's the same
9 in Paisley.

10 Q. Paisley uses the three words
11 "Baby, remind me," correct?

12 A. It uses the same partner phrase
13 words, yes.

14 Q. Ms. Finell, on the chorus of
15 Connor, it reads "All it takes is one
16 kiss to remind me"; correct, the first
17 line of the chorus?

18 A. That's correct.

19 Q. And then it goes on to say "All
20 I need is your touch to remind me,"
21 correct?

22 A. Yes.

23 Q. And then it skips three lines,
24 and the sixth line is "Baby, remind me";
25 is that correct?

1 JUDITH FINELL

2 A. Yes.

3 Q. So the structure you're talking
4 about is the use of the phrase "to remind
5 me" in the first two lines and the phrase
6 "Baby, remind me" in the sixth line of
7 her chorus, right?

8 MR. SANDERS: Object to form.

9 A. Not exactly. It's "remind me"
10 not "to remind me" in the first two
11 phrases.

12 And Connor's song always closes
13 each chorus with the partner phrase
14 "Baby, remind me." She does it in all
15 three choruses.

16 Q. Does Connor, in her song -- let
17 me take that back.

18 In her choruses, she's using
19 the phrase "to remind me" as part of a
20 line, correct, in the first and second
21 lines of her choruses?

22 A. I see the hook as "remind me"
23 not "to remind me."

24 Q. In the first two lines of her
25 choruses, she's not saying "remind me" as

1 JUDITH FINELL

2 a command. She's saying "to remind me,"
3 as part of a line, correct?

4 MR. SANDERS: Object to the
5 form.

6 A. Well, I am not a linguist, but
7 I would agree with you, that's correct.

8 Q. Are you claiming that tying the
9 word "baby" to the phrase "remind me" is
10 copying?

11 MR. SANDERS: Object to form.

12 A. I don't think I used the word
13 copying in any of my findings. But it is
14 similar. It is substantially similar, in
15 both the use of it and the way it's used,
16 the way it's partnered with the initial
17 statement of it in each case.

18 Q. In the Connor chorus, she
19 doesn't -- she uses "to remind me" in the
20 first and second lines of the chorus as a
21 prepositional phrase, correct?

22 MR. SANDERS: Object to form.

23 A. It's an affinitive. The "to
24 remind me," it's an affinitive.

25 What's your question?

1 JUDITH FINELL

2 Q. I am asking how she uses the
3 phrase "to remind me."

4 You say it's an affinitive and
5 not a prepositional phrase?

6 MR. SANDERS: Object to form.

7 A. Well, it might be.

8 Again, I'm not -- I'm a
9 musicologist. And the words and music
10 combination is what I'm expert in. But I
11 am not here as a grammarian. I mean, I'm
12 not -- I don't know how far you'll take
13 this. But I am not here to analyze
14 grammar. And I didn't do it in my report
15 and I never have been asked to.

16 Q. I know you didn't do it in your
17 report.

18 A. Good.

19 Q. Tell me why you eliminated the
20 word "to" as part of the phrase "to
21 remind me" in the first and second lines
22 of Ms. Connor's chorus?

23 A. Because I see the hook as
24 "remind me," that that's what's being
25 conveyed. And it's also the title of the

1 JUDITH FINELL

2 song. But it conforms with the criteria
3 that is most normally seen in a hook
4 which is repetitious use related to
5 the...

6 Q. In her choruses, the first and
7 second lines of the first and second
8 chorus, she's got "to remind me," "to
9 remind me." She ends both of those lines
10 with the phrase "to remind me," correct?

11 A. Where are you?

12 Q. Look at the first chorus.

13 A. Mm-hmm.

14 Q. She ends the first and second
15 lines with the phrase "to remind me,"
16 correct?

17 A. Right.

18 Q. In the second chorus, she ends
19 both lines with the phrase "to remind
20 me," correct?

21 A. Yes.

22 Q. And that's the repetitious use
23 using the phrase that you just used,
24 correct?

25 MR. SANDERS: Object to form.

1 JUDITH FINELL

2 A. I see it as just the words
3 "remind me" not the "to." That's what
4 stands out in my listening and analytical
5 experience is "remind me." Not preceded
6 by the word "to."

7 Q. So you ignored --

8 A. Although I do see the word
9 there, of course.

10 Q. All right. Let's use your
11 example of "Girls Just Want to Have Fun."
12 And then you get repeated "fun, fun,
13 fun." So, the repetitious use is "girls
14 just want to have fun, girls just want to
15 have fun," correct?

16 A. Well, I haven't analyzed that
17 entire Cyndi Lauper song, but if you did
18 just separate the word fun, then you
19 would have to look at the T-Bird song by
20 the Beach Boys, where they sing "fun,
21 fun, fun till her daddy takes your
22 T-Bird" -- I mean there would be some
23 kind of accusation if you just separated
24 out one word like that.

25 Q. So if you just took one word,

1 JUDITH FINELL

2 there might be an accusation of copying,
3 correct?

4 MR. SANDERS: Object to form.

5 A. It could trigger that, is what
6 I'm saying.

7 Q. And if you --

8 A. But if it can't be taken
9 necessarily out of that context, it would
10 probably not be accurate.

11 But I am just saying, your
12 question was such that the parallel would
13 be to remove one word like that.

14 Q. You took the phrase "remind me"
15 out of the context of the first line of
16 the chorus, right? The chorus says "All
17 it takes is one kiss to remind me." And
18 you focused on a discrete two-word
19 section?

20 MR. SANDERS: Object to form.

21 Q. Right?

22 A. That is, that is the anchor of
23 the song, the "remind me." You hear it
24 at the very end of the song. You hear it
25 in the chorus. To me, that is the hook

JUDITH FINELL

of the song. It's not the whole phrase. And it changes from one phrase to another. What stays is "remind me." The words change from "All it takes is one kiss. All I need is your touch," et cetera. Those all change. What doesn't vary is "remind me."

Q. And in your transcriptions in your full report, you didn't transcribe any of the words leading up to the phrase "to remind me" and you did not include the word "to"?

MR. SANDERS: Object to form.

A. No, I did not.

Q. So again, your transcriptions are focused on the words "remind me" and then adding the word "Baby" to it, correct?

MR. SANDERS: Object to form.

A. Well, not only. They're also focused on the shared use of the appoggiatura, the shared descending minor third and perfect fourth in both songs, and many other characteristics that they

1 JUDITH FINELL

2 share. And the leap up from the first
3 phrase to the second phrase, where they
4 each leap up one scale step, the second
5 time that "remind me" is repeated in both
6 songs, they do that the same way.

7 There is a lot of similarities
8 besides just the words. But the words
9 definitely are one of the important
10 similarities, yes.

11 Q. We'll get into that.

12 Would you -- what about the
13 words "Oh, baby, remind me, yeah," that
14 phrase appears nowhere in the Connor
15 song, does it?

16 A. What was the phrase again?

17 Q. "Oh, baby, remind me, yeah."

18 A. "Baby, remind me" does, but not
19 the "Oh" and not the "yeah."

20 Q. And in the transcriptions that
21 you did of the Paisley song, where there
22 were additional words other than "remind
23 me" or "baby," you didn't transcribe any
24 of those other words, did you?

25 A. I don't understand what part

1 JUDITH FINELL

2 you're referring to.

3 Q. Well, if you look, for example,
4 at the outro of the Paisley song where
5 Carrie Underwood sings "Oh, oh, baby,
6 remind me, baby, remind me, yeah," you
7 did not transcribe that line, did you?

8 A. I transcribed the "Baby, remind
9 me" part in my index of iterations.

10 Q. And you excluded the "Oh, oh,"
11 and the ending word "yeah," correct?

12 A. Right, that wasn't relevant.

13 Q. And you concluded it wasn't
14 relevant because it didn't appear in the
15 Connor song, correct?

16 A. It wasn't relevant to the
17 comparison process.

18 Q. It wasn't relevant to the
19 comparison process because those
20 additional words in the Paisley song were
21 not included in the Connor song, correct?

22 MR. SANDERS: Object to form.

23 A. It wasn't relevant to the
24 reasons why they sounded similar to me.

25 Q. Why?

JUDITH FINELL

1
2 A. Because that part differs.
3 That's not what made them sound related
4 to each other. And I was exploring and
5 trying to investigate what made them
6 sound similar to each other. And what
7 made them sound similar was their
8 selection, their creative choices that
9 they shared in using "remind me," and the
10 way they set that specifically to music.

11 Q. Isn't "Oh, oh" and "yeah," both
12 of which is contained in the outro of the
13 Paisley song, creative choices?

14 A. It might be, but it wasn't
15 relevant to comparing it to Connor.

16 Q. Ms. Finell, do you understand
17 that the words "Oh, oh" and "yeah" are
18 not included in Connor. So is it
19 accurate that when you were forming your
20 opinions, you looked specifically for an
21 identical word in the two songs, the
22 phrase "remind me" and the phrase "Baby,
23 remind me," correct?

24 MR. SANDERS: Object to the
25 form.

1 JUDITH FINELL

2 A. I think you're
3 mischaracterizing, if you don't mind me
4 saying so.

5 Q. Well, I do, but I'm here to get
6 your testimony.

7 A. I didn't cherry-pick. I found
8 what sounded similar between them that
9 they shared. And in both cases those
10 were really anchors of the song.

11 In the Paisley song, that
12 occurs 19 times. That's over a quarter
13 of the song in terms of the time that it
14 occupies out of the four minute plus
15 song.

16 And in the other song, it
17 occurs nine times. So it's the single
18 most repeated characteristic that the two
19 songs contain. And they're the same, or
20 they are the same in the ways that I
21 pointed out they're being the same.

22 They do have differences, but
23 what really isn't unusual is that they
24 both vary their melodies that sing those
25 words "remind me." And that even is a

1 JUDITH FINELL

2 creative choice, to not have the same
3 refrain always come back with the same
4 melody every time the words are the same.
5 That's even a creative choice.

6 But using other words, like
7 "Oh, yeah" or, you had just mentioned,
8 that wouldn't, that wouldn't influence
9 what sounded similar about them to me.

10 Q. It wouldn't influence what
11 would be similar to you because they are
12 different, correct?

13 A. In my assessment, that wasn't
14 relevant.

15 What I was trying to do was
16 determine what relationship the two songs
17 had to each other. And that's what I
18 discovered.

19 Q. Okay. In your assessment, the
20 use of the phrase "Oh, oh" or "yeah"
21 added in or around "Baby, remind me" were
22 different between the two songs, correct?

23 A. They were pretty irrelevant. I
24 mean, that's very common. There are
25 millions of songs that use "Yeah" and

1 JUDITH FINELL

2 "Oh, oh" and those kinds of explanations.

3 What matters really are the key
4 words of the phrase. And the key words
5 were the same.

6 And they also varied in the
7 same way by adding the word "Baby" before
8 the key words "Baby, remind me."

9 Q. Is the use of the word "baby"
10 in music commonplace, Ms. Finell?

11 MR. SANDERS: Object to form.

12 A. By itself, it isn't. But it
13 was set in the same way. It was really a
14 combination of the similarities that
15 convinced me that this was similar.

16 Q. Is "Baby, remind me" different
17 from "Remind me, baby"?

18 MR. SANDERS: Object to form.

19 A. I don't know. It would depend
20 -- if it was in a song, it would depend
21 on what notes were sung and their
22 rhythms. It could be very different.

23 Q. It could be very different.

24 Does --

25 A. Not in meaning, but perhaps

1 JUDITH FINELL

2 musically.

3 Q. Does concluding substantial
4 similarity between two songs justify
5 excluding lyrics that are not common
6 between the two songs?

7 MR. SANDERS: Object to the
8 form. Legal conclusion.

9 A. The job of the musicologist is
10 to separate the -- and evaluate the
11 nature of the similarities, how -- if
12 they are generic or distinctive, and
13 their importance, their commonality.

14 Q. In this case, you chose to
15 exclude certain lyrics in making your
16 substantial similarity analysis, correct?

17 MR. SANDERS: Object to form.

18 A. I didn't choose to exclude
19 those lyrics. But in the process of
20 analyzing them, yes, I focused on the
21 lyrics that I found to be similar that
22 were important to both songs.

23 Q. Is the methodology of electing
24 to exclude certain lyrics a practice
25 among other musicologists?

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 A. It's not just lyrics. It could
4 be anything. It could be melody. It
5 could be harmony.

6 Q. Let's focus on my question,
7 please.

8 Is the practice of electing to
9 exclude lyrics that are not similar, not
10 common between two songs, a practice
11 that's common among musicologists?

12 MR. SANDERS: Object to form.

13 A. In ways, yes. A musicologist
14 is trained to assess the levels of
15 importance of various material. And if
16 you're comparing two works, you do focus
17 on what is similar between them. That's
18 the nature of comparative analysis.

19 Q. Don't musicologists, in
20 conducting an analysis, analyze both
21 similarities and dissimilarities?

22 A. Yes. They separate them out.
23 But then at some point, if they feel
24 there is a similarity, as I pointed out
25 in my both reports, the substantial

1 JUDITH FINELL

2 similarity is between the hooks of the
3 songs. I don't look at, you know,
4 everything.

5 I look at what seems to be
6 driving my conclusion that they're
7 similar or not. In this case, it was the
8 hooks.

9 Q. You have used the word melisma
10 in your report.

11 Is melisma a commonplace device
12 in songwriting?

13 A. As a device, it's common. But
14 how it's used in different pieces of
15 music would determine whether or not one
16 piece of music was similar to another.
17 Not just the use of the melisma, but how
18 it's used.

19 Q. In your report at Page 47,
20 excuse me, at page -- excuse me.

21 In your report at paragraph 47,
22 you state that "There are individual
23 differences in the melodic, harmonic or
24 structural material."

25 Would you please tell us and

1 JUDITH FINELL

2 list them out for us what the differences
3 in structural material are?

4 MR. SANDERS: Object to form.

5 Q. Between the Paisley and Connor
6 songs?

7 A. I don't have a list, but the
8 reason why I said this in paragraph 47 is
9 because I'm acknowledging that their
10 structures are not identical, but that --
11 what I am saying is it doesn't influence
12 the similarities that I found.

13 Q. In your report, you did not
14 list out differences in the structure of
15 the two songs, correct?

16 A. No. It didn't seem relevant.

17 Q. So tell me, please, everything
18 that you can think of that are
19 differences in the structural material
20 between the two songs?

21 MR. SANDERS: Object to form.

22 A. Well, we went over this before.
23 The Paisley song has a lengthier
24 introductory section. It has an
25 interlude section. It has a closing

JUDITH FINELL

section that's more complex, and has some instrumental in the recording, which is different from the underlying song. But the recording, at least, has some instrumental materials that aren't found in a similar location in Connor.

Connor is a simpler structure and a shorter song. But the overall structure of two musical compositions, unless there is something extremely unusual about it that appears to have been copied, in general, the structure of the overall architecture of a piece of music and the way it's organized is not what I normally focus on.

Q. So the overall structure of Paisley and Connor is not substantially similar?

A. It's similar --

MR. SANDERS: Object to form.

A. In their alternations in choruses and verses.

Q. And you've agree there is nothing unique or original about that,

1 JUDITH FINELL

2 correct?

3 MR. SANDERS: Object to form.

4 A. Not with that, but what I did
5 notice that within each section, there
6 are similarities of phrase sets and
7 partner phrases. And that's part --
8 should I keep going?

9 Q. Please do.

10 A. And that's part of the
11 structure, as well.

12 Q. Let me ask you about harmonic
13 issues.

14 Do you know what key Connor is
15 recorded in?

16 MR. SANDERS: Object to form.

17 A. You asked me that before. I
18 believe I stated in my report, but I
19 don't remember without having this.

20 Q. Now, in keeping with
21 musicological practices, is it correct
22 that upper case Roman numerals are used
23 to denote major cords?

24 A. It varies in methodology, but
25 that's one way of doing that.

1 JUDITH FINELL

2 Q. Is that a practice that you use
3 as a musicologist?

4 A. I have been taught to use it.
5 It varies. But it's one way of
6 communicating.

7 Q. And as a musicological
8 practice, lower case Roman numerals are
9 used to denote minor cords?

10 A. Usually.

11 Q. And as a matter of practice,
12 that's generally what you do?

13 A. Sometimes. That's a way of
14 denoting the function of the cord.

15 Q. You did not chart out the cords
16 in the Connor song, did you?

17 A. No.

18 MR. SANDERS: Object to form.

19 Q. You did not chart out the cords
20 in the Paisley form?

21 MR. SANDERS: Object to form.

22 A. Mostly that was done by the
23 sheet music. It was accurate enough for
24 a frame of reference.

25 But I didn't -- I did not find

1 JUDITH FINELL

2 that the cords, similarities or
3 differences between the cords were
4 relevant to the similarities that I found
5 between the songs.

6 Q. You did not find substantial
7 similarity between the cord structure of
8 the Paisley song and the Connor song?

9 MR. SANDERS: Object to form.

10 A. I didn't develop an opinion on
11 whether or not they were similar nor did
12 I claim that they were. That's not
13 really what I focused on in this
14 comparison.

15 Q. You focused on giving the
16 Plaintiff as many similarities as you
17 could, correct?

18 MR. SANDERS: Object to form.

19 A. No. No. That's not correct at
20 all.

21 Q. Did you, in your report, list
22 any harmonic similarities between Connor
23 and Paisley?

24 A. Well, the appoggiatura is
25 partially a harmonic. It creates a

1 JUDITH FINELL

2 dissonance. That's a harmonic concept.

3 Q. Did you chart out the cords in
4 which you claim the appoggiaturas exist?

5 A. No, I did not. But I heard
6 them, and that's how I determined that
7 they were appoggiaturas.

8 Q. Did you chart out the cord
9 progressions in either song?

10 MR. SANDERS: Object to form.

11 A. They were mostly provided by
12 the sheet music.

13 Q. You don't have any sheet music
14 for Connor, do you?

15 A. No.

16 Q. Did you make the determination
17 whether the cord progressions in Paisley
18 and Connor were similar or different?

19 MR. SANDERS: Object to form.

20 A. They were similar in style.
21 But they weren't unique enough in either
22 song to warrant looking further. That is
23 not what made them sound the same.

24 Q. So they were similar in style,
25 but they weren't the same, correct?

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 A. I do not know the answer to
4 that. I haven't conducted that study.

5 Q. So as part of your analysis,
6 you did no analysis to determine whether
7 cord progressions are similar or
8 different, correct?

9 MR. SANDERS: Object to form.

10 A. They didn't seem remarkable.
11 And so I did not focus on the cord
12 progressions.

13 Q. Ms. Finell, as part of your
14 analysis, you did no analysis to
15 determine whether cord progressions in
16 the Connor and Paisley were similar or
17 different, correct?

18 MR. SANDERS: Object to form.

19 A. No, I did not.

20 Q. With the exception of the
21 bridge, do you know what the major --
22 strike that.

23 Can you tell me what harmonic
24 rhythm is?

25 A. Yes. Harmonic rhythm describes

JUDITH FINELL

the rhythmic pace at which the cords, cord progressions change from one cord to the next. So if a cord, for example, is held for two or three beats before there is a new cord, the two or three beats would be part of the harmonic rhythm. It means how long the cord is sustained before the next cord.

Q. In doing your musicological work in this case, did you analyze the harmonic rhythm in Connor?

A. In terms of the strumming, is that what you're talking about? I don't understand.

Q. In terms of the definition that just used of harmonic rhythm, did you conduct that analysis about the Connor song?

A. No.

Q. Did you conduct an harmonic rhythm analysis about the Paisley song?

A. No.

Q. Do you even know what it is for either song?

1 JUDITH FINELL

2 A. I don't care what it is for
3 either song.

4 Q. In your report at paragraph 47
5 on Page 26, you say that "There are
6 differences in harmonic material."

7 I want you to please list out
8 all the differences in harmonic material
9 between Connor and Paisley.

10 MR. SANDERS: Object to form.

11 A. I did not mean that when I said
12 that.

13 Q. You didn't mean that?

14 A. I did not mean it the way you
15 just interpreted it.

16 Q. All right. Your sentence there
17 ends "and this similarity overrides any
18 individual differences in the melodic,
19 harmonic or structural material."

20 And by that I mean between the
21 two songs, correct?

22 A. Yes.

23 Q. So tell me what the harmonic
24 differences are between Connor and
25 Paisley?

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 A. What I meant in that sentence
4 is that whatever the differences are,
5 they are not as pertinent as the
6 similarities. That's what I was
7 conveying there.

8 It is not that I listed the
9 differences. It's that I acknowledge
10 that there were some differences,
11 probably, as would be in any two songs,
12 especially of different lengths.

13 And despite those differences,
14 the similarities overrode that.

15 Q. What harmonic differences do
16 you acknowledge being in the two songs,
17 Connor and Paisley?

18 A. They are not identical to one
19 another, but I did not do that analysis.
20 So I can't tell you.

21 But I know that the
22 similarities are stronger than any
23 harmonic deviations they have.

24 Q. I understand that that's what
25 you want to say.

1 JUDITH FINELL

2 I am asking you, as a
3 musicologist, having listened to these
4 two songs dozens of times, what the
5 differences are harmonically?

6 A. It's not something I can sit
7 here and recite --

8 MR. SANDERS: Object to form.

9 A. -- like that, by memory,
10 without really analyzing it.

11 Q. And because you did not find
12 harmonic similarities, you did not
13 include those in your report?

14 MR. SANDERS: Object to form.

15 A. The harmonic similarities which
16 were probably also present were not what
17 I focused on.

18 Q. Just --

19 A. Even the dissimilarities or the
20 similarities. I didn't focus on it,
21 period.

22 Q. For the harmonic differences
23 that you did find, just tell me which
24 ones you found?

25 A. I don't -- I did not analyze

1 JUDITH FINELL

2 the harmonies. I did not analyze for
3 similarities and differences, either. I
4 did not feel it was relevant.

5 MR. WARNOCK: Do you want to
6 take a break?

7 THE WITNESS: Okay, thank you.
8 (Off the record.)

9 Q. Ms. Finell, we are back after
10 the break.

11 Let me ask you to look at
12 Exhibit 5, which is side by side the
13 lyrics of the Connor and Paisley songs.

14 And let's look at the first
15 chorus. Ms. Connor's song starts with
16 the line "All it takes is one kiss to
17 remind me." Correct?

18 A. Yes.

19 Q. And that line does not appear
20 in the Paisley chorus or anyplace else,
21 correct?

22 A. Well, there is the word kiss
23 there, "The way I used to kiss your neck"
24 in chorus 1, the second line.

25 Q. Does the phrase "All it takes

1 JUDITH FINELL

2 is one kiss to remind me" appear in the
3 Paisley song?

4 A. The exact phrase, no.

5 Q. The second line of the Connor
6 chorus is "All I need is your touch to
7 remind me."

8 Does that phrase appear
9 anywhere in the Paisley song?

10 A. No.

11 Q. Then if you look at the Connor
12 chorus, it jumps three lines and ends
13 with what you characterize as the partner
14 phrase "Baby, remind me." Correct?

15 A. Yes.

16 Q. Look at that first chorus on
17 Paisley, there is no "Baby, remind me" in
18 there, is there?

19 A. No, not here.

20 May I look at the sheet music
21 for a minute?

22 Q. If you need to.

23 A. Thank you.

24 (Witness reviews document.)

25 A. Okay, the answer is no.

1 JUDITH FINELL

2 Q. Is 4/4 meter a basic
3 foundational musical building block?

4 MR. SANDERS: Object to the
5 form.

6 A. It's common. It's called
7 common meter.

8 Q. What's the tempo of the Connor
9 song?

10 A. You mean how many beats per
11 minute does it have.

12 Q. You tell me what tempo is.

13 A. Tempo describes the pace in a
14 recording as it's described by beats per
15 minute. Otherwise it could be, it could
16 be shown by a metronome marking or
17 various musical words that indicate the
18 pacing, whether it's fast, slow, or
19 someplace in between.

20 Q. Okay. What's the tempo of the
21 Connor song?

22 A. I didn't measure the beats per
23 minute. It's on the slower side.

24 Q. What's the tempo of the Paisley
25 song?

1 JUDITH FINELL

2 A. It's sort of medium. I hate to
3 use terms like that without giving
4 precise. But I didn't measure them in
5 that way.

6 Q. Okay. So Connor's slower.
7 Paisley is medium?

8 A. Yeah. And that's a recording
9 element. It can be a performance
10 element. It's somewhat interpretive on
11 the part of the musicians.

12 Q. Is the overall rhythmic feel in
13 the two songs different?

14 MR. SANDERS: Object to form.

15 A. Rhythm is not the same as
16 tempo. I don't -- are you relating this
17 to the tempo question?

18 Q. Why don't you tell me what, how
19 you characterize rhythm or define rhythm?

20 A. Rhythm describes the duration
21 of musical material in this case or in
22 musical cases.

23 In other words, the length of
24 time, usually in beats, that one
25 particular note or cord is sustained

1 JUDITH FINELL

2 before the next occurrence of the same
3 thing, whether it's an individual note or
4 a cord, which is a series of notes
5 together.

6 Q. Is the rhythm of the -- in the
7 recording of Connor that you listened to,
8 it had a guitar, correct?

9 A. Yes.

10 Q. And the recording you listened
11 to of Paisley had more instrumental
12 parts, correct?

13 A. Do you mean parts as in
14 sections?

15 Q. It had more instruments playing
16 on the recording that you listened to?

17 A. That's correct.

18 Q. And is the rhythm of the guitar
19 in Connor different than the rhythm of
20 the instrumental parts in Paisley?

21 A. I didn't analyze that. In
22 order to do that, I would have to
23 transcribe the entire accompaniments of
24 all the instruments, because in Paisley
25 there are multiple instruments playing

1 JUDITH FINELL

2 all at the same time. And each one has
3 its own rhythm.

4 And in Connor, it's a single
5 accompaniment, which is the guitar.

6 Q. And you did not do so, because
7 you determined, in your mind, that they
8 were not sufficiently similar to merit
9 transcription?

10 MR. SANDERS: Object to form.

11 A. No, that is not why I did it.
12 I did not think that it was relevant to
13 the reasons why I thought the song
14 sounded similar to each other.

15 Q. Is the melodic rhythm in the
16 vocals of Connor and Paisley different?

17 A. What portion? You're talking
18 about a four minute song.

19 Q. Let's say the chorus. Is the
20 melodic rhythm in the vocals of the
21 chorus of Connor and Paisley different?

22 A. I would have to -- you would
23 have to be more specific. Which phrase?
24 There are many phrases.

25 So, I mean, I can't generalize

1 JUDITH FINELL

2 over that many notes.

3 Q. You can't generalize over a
4 chorus, ma'am?

5 A. It's not --

6 MR. SANDERS: Object to form.

7 A. It's not a valid question about
8 rhythm.

9 Q. Ms. Finell, let's look at the
10 first choruses in both Paisley and
11 Connor, if you will, please, on Exhibit
12 5.

13 And can you compare line by
14 line what the rhythm is in each of the
15 lines? Can you compare the melody to
16 which the words have been said line by
17 line in the first chorus in Paisley and
18 Connor?

19 MR. SANDERS: Object to form.

20 A. I haven't transcribed the full
21 melody of either song, so I cannot do
22 that here, sitting here, without having
23 done that first.

24 Q. So a transcription of the
25 entire choruses would be required in

1 JUDITH FINELL

2 order to draw a comparison between the
3 entirety of the two choruses, correct?

4 A. In order to draw a comparison
5 of the recording of the two choruses,
6 yeah.

7 Q. No, ma'am. In order to draw
8 any similarities or differences in the
9 compositions embodied in the choruses --
10 excuse me, the composition embodied in
11 the recordings?

12 A. Well, as far as I know, there
13 is nothing that preceded the Connor
14 recording. There wasn't a handwritten
15 piece of sheet music that -- the
16 recording is the first existence of the
17 song, as far as I know.

18 Is that what you're asking?

19 Q. Wouldn't your transcription of
20 the chorus, in fact, create the --
21 wouldn't your transcription, in fact,
22 create the composition embodied in the
23 chorus of Connor?

24 A. A transcription is of something
25 that's heard. So in this case, it would

JUDITH FINELL

embody the recording. So to the extent that the recording represents the composition, yes. But I don't really know if there were other versions that aren't heard in the recording. All that a transcription does is record what is heard.

Q. Okay. Does the transcription represent the composition embodied in the recording?

A. Yes.

Q. Do you agree that setting a note on the beat -- well, first of all, can you tell me as a musicologist what setting a note on the beat means?

A. Well, beats are divided into -- are subdivided, for example, in 4/4 time. There are four primary beats, but each of those can be subdivided into halves.

In other words, instead of -- every beat would be equivalent of a quarter note, which would mean it's a quarter of the measure, in essence, so four beats equals one measure in 4/4

JUDITH FINELL

1
2 time.

3 You can subdivide that into 8th
4 notes. So that you have two notes per
5 beat, each equidistant from one another.

6 Q. And then you can further
7 subdivide into 16ths and 32nds and so on,
8 on to nearly infinity or as fast as
9 someone's fingers or tongue could go?

10 A. Well, in musical culture, but
11 after about 64th notes, that's about as
12 far as I go, or western music usually
13 stops somewhere around there.

14 Q. Do you agree that setting a
15 note on the beat is rhythmically
16 different than setting a note off of the
17 beat?

18 A. To some extent it is, but it
19 depends on how far off the beat and what
20 the context is.

21 But, yes, on the beat is
22 different from off the beat. But if it
23 is still on the same beat, then it is not
24 very far off.

25 Q. You've identified that there

1 JUDITH FINELL

2 are nine iterations of "remind" sung in
3 the Connor song, correct?

4 A. Yes.

5 Q. And in each of the iterations,
6 based on your transcriptions, isn't it
7 true that the second syllable "mind"
8 lands on the downbeat each time?

9 A. I would have to look at my
10 iteration --

11 Q. Please do.

12 A. -- index.

13 Well, iteration 9 and 10 do
14 not.

15 Q. Tell us where you're looking.

16 A. Wait a minute, I am looking at
17 the wrong section.

18 Q. You're looking at the demo
19 copy, aren't you?

20 A. Exhibit B, yes. That was a
21 mistake. I'll look at the correct one.

22 Exhibit A is the one I should
23 have been looking at.

24 Excuse me, could you repeat the
25 question, please?

1 JUDITH FINELL

2 Q. Of the nine iterations of the
3 word "remind" sung in the Connor song,
4 isn't it true that the second syllable
5 "mind" lands on the downbeat each time?

6 A. Yes.

7 MR. WARNOCK: Sorry, I didn't
8 hear where we were. What page?

9 MR. HARVEY: Exhibit A of her
10 report.

11 THE WITNESS: It's Page 27.

12 Q. And that's a creative choice,
13 correct?

14 MR. SANDERS: Object to form.

15 A. Yes.

16 Q. And you're not claiming that
17 that's unique to Ms. Connor?

18 MR. SANDERS: Object to form.

19 A. I don't know if it's unique to
20 Ms. Connor, but it is a creative choice.

21 Q. You don't know if it's unique
22 to Ms. Connor because you haven't looked,
23 correct?

24 A. In my experience, I am not
25 aware of another song that has the second

1 JUDITH FINELL

2 half of the word "remind" landing on the
3 downbeat. That would take investigation
4 to find. I don't know if it's there or
5 not.

6 Q. That would require a prior art
7 search that was not conducted in this
8 case, correct?

9 A. That's correct.

10 Q. And did you consider whether
11 other songs prior to 2008 had "mind" on
12 the downbeat for the word "remind"?

13 A. You mean in isolation?

14 Q. Yes, ma'am.

15 A. No. I don't search in prior
16 art in that level of dissection.

17 Q. If they did, if there was prior
18 art that had the word -- had the syllable
19 "mind" on the downbeat, would you agree
20 that that's not unique?

21 MR. SANDERS: Object to form.

22 A. I might. But there are so many
23 other similarities. I wouldn't isolate
24 the, a half of a word as being the
25 turning point of whether or not two

JUDITH FINELL

similarities are important or not. I mean, there are the others. But it's possible that some piece of music somewhere places the word "mind" as part of a fuller word "remind" on the downbeat.

Q. In your report on Page 2, one of your conclusions is the lyrics, the phrase "remind me" and "Baby, remind me" are repeated throughout the songs always with varying melodies.

Do you see that in your report?

A. Are you in paragraph 6?

Q. Yes, I am. In paragraph 6 of your report you state "The lyrics 'remind me' and 'Baby, remind me' are repeated throughout the songs always with varying melodies."

A. I don't see the "Baby, remind me" part. I must be looking at a different part of my report. In paragraph 6 it just talks about "remind me."

Q. Okay. Excuse me. So the

1 JUDITH FINELL

2 lyrics you're talking about being
3 repeated throughout the songs always with
4 varying melodies are the words "remind
5 me"?

6 A. That's right.

7 Q. Not the words "Baby, remind
8 me"?

9 A. "Baby, remind me" is part of
10 the relationship, but it's the "remind
11 me" part that I was talking about there.

12 Q. So you will agree that there
13 are no identical melodies between Connor
14 and Paisley about the words "remind me"?

15 A. There are identical features
16 between them, but not -- and they do have
17 some, and they have some scale degrees
18 and rhythms in common, but they are not
19 identical in every aspect, no.

20 Q. My question, Ms. Finell, and I
21 think you understand this, you will
22 agree, there are no identical melodies
23 between Connor and Paisley that include
24 the lyrics "remind me"?

25 A. That's correct.

1 JUDITH FINELL

2 Q. And the only identical lyrical
3 similarities between these two songs are
4 the use of the phrases "remind me" and
5 "Baby, remind me," correct?

6 A. Well, as I said, there are
7 other words that are also scattered
8 between the songs. I think kiss. And I
9 believe neck. There are some other
10 isolated words.

11 But what makes them sound
12 similar is the shared use of "remind me"
13 and the partner phrase "Baby, remind me."

14 Q. You're not claiming there is
15 some copying about the use of the word
16 "kiss," are you?

17 MR. SANDERS: Object to form.

18 A. No, I'm not.

19 Q. In your report, at paragraph
20 47, you state that there are differences
21 in melodic material.

22 Can you please tell us what the
23 differences in the melodic material are
24 between Connor and Paisley?

25 MR. SANDERS: Object to form.

1 JUDITH FINELL

2 A. My answer is the same as it was
3 for harmony. Didn't itemize every
4 melodic difference. But what I was
5 saying is the similarity is what is
6 prevalent over melodic dissimilarities,
7 in my opinion.

8 Q. So you didn't draw any
9 comparison about harmony, correct?

10 MR. SANDERS: Object to form.

11 A. I thought you were asking me
12 about melody.

13 Q. I am asking that. You didn't
14 draw any comparison about harmony,
15 correct?

16 MR. SANDERS: Object to form.

17 A. I compared it and listened to
18 it, but I didn't choose to focus on it.
19 Nor did I discuss it.

20 Q. So you didn't focus on
21 differences in melody, correct?

22 MR. SANDERS: Object to form.

23 A. No, I did. I acknowledged that
24 there are differences in the melody
25 throughout my report.

1 JUDITH FINELL

2 Q. So tell me the differences in
3 the melody between Connor and Paisley,
4 please.

5 MR. SANDERS: Object to the
6 form.

7 A. I would have to go through
8 every single iteration to do that.

9 Do you want me to?

10 Q. Mr. Finell, in your report, you
11 don't tell us what differences there are.

12 I am asking you if you can tell
13 us what differences you identified
14 between Connor and Paisley?

15 MR. SANDERS: Object to the
16 form.

17 A. The main point in my report is
18 that in both Paisley and Connor, they do
19 not use one singular melody every time
20 they use the hook "remind me." In fact,
21 what makes it coherent is the hook itself
22 because the melody doesn't recur.

23 In Paisley, out of the 19
24 iterations, there are 16 versions of the
25 hook melody sung to "remind me."

1 JUDITH FINELL

2 In Connor, out of nine, there
3 are five versions of the melody. They
4 vary.

5 And actually, Paisley is much
6 closer to itself in its variations,
7 because it has certain characteristics
8 that recur in every single iteration.

9 And those similarities do
10 reflect in Connor's song, too.

11 But as I say, they each are
12 unusual in that characteristic, that they
13 don't have one melody that returns every
14 time the hook lyrics return.

15 Q. In your Exhibit A to your
16 report, Page 27, you have iterations of
17 "Remind Me."

18 Is it correct that the melody
19 set to "Remind Me" is the same in a1 and
20 a4?

21 A. Yes.

22 Q. Is it correct that the melody
23 is the same, not varied in a2 and a5?

24 A. That's correct.

25 Q. And is it correct that the

1 JUDITH FINELL

2 melody set to "Remind Me" is the same and
3 not varied in a3, a6 and a9?

4 A. Wait. a3, a6?

5 Q. And a9.

6 A. a6 is a little bit different
7 rhythmically, so it is varied.

8 And a9 is the same rhythmically
9 as a6, but not the same rhythmically as
10 a3.

11 Q. I understand you're talking
12 about rhythmically.

13 Look at the words "remind me."
14 Isn't the melody set for "remind me" the
15 same for a3, a6 and a9?

16 A. Not the whole melody, but just
17 the part that has the words "remind me,"
18 not "baby"; is that what you're saying?

19 Q. Yes, ma'am.

20 A. The ending rhythm in a3 is a
21 tied -- is -- for "Remind Me" is an 8th
22 followed by two 8ths, followed by a half
23 note tied to an 8th note, that's a3.

24 a6 is, for "Remind Me" is an
25 8th, two 8ths and a dotted half note.

1 JUDITH FINELL

2 A -- what was the other one you
3 asked me about?

4 Q. a9.

5 A. a9 is the same rhythm as a6.

6 Q. That contradicts the "always"
7 in paragraph 6 of your report, doesn't
8 it?

9 MR. SANDERS: Object to form.

10 A. What paragraph, please?

11 Q. Doesn't the answer that you
12 just gave me contradict the word "always"
13 that you used in paragraph 6 of your
14 report?

15 A. That's taken -- no, I mean they
16 continue to change the melody. It's not
17 the same over and over again, as it is in
18 most hooks in most popular songs. That's
19 what I meant. That's different than most
20 popular songs.

21 Q. Tell me what you mean when you
22 say it's "different than most popular
23 songs"?

24 A. Most popular songs contain a
25 hook, a hook that's an identifying

JUDITH FINELL

feature. If it's a vocal work, then it's usually certain lyrics that repeat. And when those lyrics repeat, the melody that goes with those lyrics also repeat. It becomes a signature of the song. If you will, kind of a musical logo of the song.

In this song, the melody that supports the lyrics "remind me" continues to change throughout the song, and it does it in both songs like that.

There are similarities, as I pointed out, within the song itself. Sometimes it recurs again. But it's never ongoing. It's never constantly the same. And that's unusual.

Q. In paragraph 6, you write "Always with varying melodies." Correct?

A. Yes, they always vary.

Q. But that's not the case in six out of nine iterations of "remind me" in Connor, correct?

MR. SANDERS: Object to form.

A. No. There are five different melodies out of nine in Connor. Not six.

1 JUDITH FINELL

2 But, yes, there are some that
3 recur, but they don't recur
4 consecutively. They alternate.

5 There is a kind of rotation in
6 Connor where it's melody A, then melody
7 B, then melody C.

8 And then the second chorus
9 comes back, and yes, that's a repeat of
10 the first chorus. So, it's A, B, C
11 again.

12 The third chorus comes back,
13 it's a little varied. That's why the
14 rhythms are different.

15 What I am saying is in Connor,
16 there is a rotation of differing melodies
17 for the same words. That's unusual.

18 Q. And is it that rotation of
19 iterations in Paisley?

20 A. Paisley is really grouped in
21 pairs rather than threes. So Paisley --
22 but the way in which the melodies are
23 constructed is really similar. And
24 that's one of the first similarities that
25 I noticed beyond the words.

JUDITH FINELL

So in Paisley, the first time "remind me" comes in, there is a leap involved of a distance of what you call a 5th interval, from a C to a G for "remind me."

The second time "remind me" comes back and immediately in a consecutive phrase. And instead of 1 to 5, it's 1 to 6 -- I am sorry, 2 to 6.

Let me look at it. It starts 1 to 5 for "remind me." And then it's 1 to 6. It goes up. It becomes the highest pitch of the phrase for Paisley each time.

And it's the same in Connor's. The "mind" is the highest pitch of the phrase for the word "remind" in Connor also.

And both times, Connor, the second iteration, goes up a step, just like it does in Paisley. And that's something I noticed. And then they both go down the same interval often, which is the minor third and sometimes a perfect

1 JUDITH FINELL

2 fourth. It's called the same contour.

3 Q. So to use your word, the
4 contour.

5 What's the musicological
6 definition of contour?

7 A. The shape of a melody. Does it
8 go up, does it go down or does it stay
9 static.

10 Q. So for the phrase "remind me,"
11 in Connor, it goes up and then down,
12 right?

13 A. It's not the up and then down.
14 It's the up, and then the next phrase
15 going up an extra step. They both do
16 that exactly the same way on the same
17 word.

18 Q. Ms. Finell, for the Connor
19 song, when she sings "remind me" or has
20 written the song "Remind Me," she goes up
21 and then down for "remind me," correct?

22 A. Well, yes, but I am talking
23 about the "remind" part.

24 Q. And for Paisley, for the
25 composition around the words "remind me,"

1 JUDITH FINELL

2 there's up and then down, correct?

3 A. Yes.

4 Q. Now, just in normal vocal
5 inflection, doesn't a human voice
6 naturally go up on the word "remind me"?

7 MR. SANDERS: Object to form.

8 A. I would say that that doesn't
9 always translate into music, because in
10 the other music that you may find, using
11 the word "remind," there would be plenty
12 of examples where it's not elevated,
13 where it's descending, or it's static and
14 there is no leap at all.

15 What's interesting is that they
16 highlight that "mind" by raising it
17 exactly the same amount the second time
18 from the first, in both songs. It's a
19 whole step.

20 Q. In the -- the question I asked
21 before was, as you described the rotation
22 of iterations of "remind me" in Connor,
23 that's not the same rotation of
24 iterations of "remind me" in Paisley, is
25 it?

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 A. Connor's grouped in threes in
4 each chorus. There is the part -- there
5 is the phrase sets, which are the two
6 remind mees. And each of them have that
7 same characteristic that I am mentioning
8 in Paisley of the second "remind me"
9 being one step higher than the first one
10 for the syllable "mind." And then the
11 third within the same chorus is the
12 closing phrase. And that's the phrase,
13 that's the partner phrase "Baby, remind
14 me."

15 And that's how Connor is
16 organized for three choruses.

17 Q. And you agree that there is no
18 partner phrase in the first chorus of
19 Paisley?

20 A. No. It starts in the second
21 chorus.

22 Q. So you say that Connor is
23 grouped in threes. And Paisley is
24 grouped in twos; is that correct?

25 A. It's not that they're only two

JUDITH FINELL

1 in the chorus. There are many more than
2 two in the chorus. But the group is that
3 the first, in the key of C, since I've
4 transposed them all into the key of C, in
5 the key of C "remind me" in Paisley is C
6 to G for "remind." The next phrase
7 "remind" is C to A, that's one step above
8 the first one. It's higher. And in each
9 case, that's the highest pitch of the
10 "remind me" phrase, that's exactly what
11 they do in Connor. "Mind" is always the
12 highest note of the phrase.
13

14 Q. Sure.

15 A. And the second phrase that
16 echos the first also goes up one whole
17 step the same way.

18 Q. To just touch on what you said
19 a second ago, Connor is organized in
20 groups of three, right?

21 A. That's structural, yes. But I
22 am looking at the way the melody is
23 constructed, not the structure of the
24 songs.

25 Q. And Paisley is organized in

1 JUDITH FINELL

2 groups of twos, correct?

3 A. In pairs, yes. Sets, yes.

4 They both have sets.

5 Q. So we've got Connor organizing
6 in groups of threes. Paisley organizing
7 in pairs.

8 A. No. I -- I am sorry, I
9 shouldn't interrupt you.

10 Q. Is that a difference between
11 the two songs?

12 A. I think you're conflating two
13 elements here. They both have phrase
14 sets, which are pairs. And they also
15 have a partner phrase. I show it in my
16 chart in my report, which I can show you,
17 if you would like.

18 What I am saying is that in
19 every chorus of Connor she has three
20 iterations. The first two are the phrase
21 set. And the third one is the partner
22 phrase with "Baby."

23 In Connor, it's organized in
24 phrase sets, too. But there isn't a
25 partner phrase until the second chorus.

1 JUDITH FINELL

2 Q. And that's a difference between
3 the two songs, correct?

4 A. It's a difference in the number
5 of iterations. It's not a difference
6 within the iterations.

7 Q. And your transcriptions of
8 Remind Me, there are different scale
9 differences in Connor and Paisley, aren't
10 there?

11 A. Yes. I said that their
12 melodies are not identical.

13 Q. You've talked about nine
14 different iterations of the words "remind
15 me" in Connor.

16 How many different phrases
17 incorporating the words "remind me" are
18 there in Connor?

19 A. There are nine.

20 Q. Okay. I am asking about
21 different phrases.

22 A. I am sorry, I don't understand.

23 Q. I am asking you how many
24 different phrases incorporating the words
25 "remind me" are in Connor. You've got

1 JUDITH FINELL

2 two "remind me," the affinitive, you've
3 already identified, correct?

4 A. Yes.

5 Q. And that's in lines 1 and 2 of
6 her chorus, correct --

7 A. Okay. Yes.

8 Q. -- right? You've got, at the
9 end of her song -- at the end of her
10 choruses 1 and 2, and then at the very
11 ending, she uses the phrase "Baby, remind
12 me." Correct?

13 A. At the end of each chorus, yes.

14 Q. Yes, ma'am.

15 A. Mm-hmm.

16 Q. And then --

17 A. And she does sometimes just use
18 "remind me," as you can see in the final
19 chorus.

20 Q. Yes. One time in her song she
21 uses the phrase "remind me" standing by
22 itself, correct?

23 A. I haven't analyzed that, but I
24 just saw that. I didn't analyze the two,
25 as you can see in my iteration index

1 JUDITH FINELL

2 here. So it would take me some time to
3 go through the lyrics.

4 Q. It's a short song. I just want
5 to know how many different phrases she
6 uses. She uses the phrase "remind me" by
7 itself one time in her song in the last
8 chorus, correct?

9 MR. SANDERS: Object to form.

10 A. Within the Exhibit number 5
11 that you gave me. But I haven't compared
12 this to the recording.

13 Q. If you're having trouble with
14 Exhibit 5, then look at the lyrics that
15 you've got in your notebook that you
16 studied.

17 A. Thank you. This differs from
18 what you gave me here. There are
19 differences in the lyrics that you gave
20 me in Exhibit 5 and the lyrics that I
21 received from the Connor law firm.

22 Q. The reason I think, Ms. Finell,
23 is because what you have in Exhibit 5 is
24 actually what's on the copyright deposit
25 copy. And I guess Ms. Connor's version

1 JUDITH FINELL

2 that she gave you doesn't go word for
3 word?

4 A. It isn't word for word.

5 Q. Look at the chorus, please.

6 A. Okay, I looked at chorus 1.
7 Should I continue just for choruses or
8 verses also?

9 Q. Just look at the choruses.

10 A. The "remind me" phrase alone
11 without the word "to" in front of it on
12 Exhibit 5 doesn't appear on the sheet, on
13 the lyrics sheet that I received.

14 There are other -- I think
15 there are differences in the verses, too,
16 but I didn't complete that.

17 Q. I am on the choruses. So if we
18 will, just to count the number of
19 different phrases that Ms. Connor uses in
20 her song that include the words "remind
21 me," she uses the phrase "to remind me"
22 four times, correct?

23 MR. SANDERS: Object to form.

24 A. Now I have to count, because I
25 haven't really analyzed that.

1 JUDITH FINELL

2 Q. I know you haven't analyzed it.
3 But do me a favor and look at choruses 1
4 and 2, and confirm that she's used the
5 phrase "to remind me" four different
6 times.

7 MR. SANDERS: Object to form.

8 A. In choruses 1 and 2 on the
9 lyric sheet that I received, as opposed
10 to Exhibit 5, I see it twice. Chorus 1
11 and probably on the repeat. But it's not
12 written out the second time. It just
13 says chorus. And then it says nothing.

14 Q. Okay. In her song, how many
15 times did she use the phrase "Baby,
16 remind me"?

17 A. On the lyric sheet that I
18 received? Is that what you mean?

19 Q. On what Ms. Connor has
20 represented to you are the lyrics of her
21 song, sure, take a look at that.

22 A. Well, I see it for the only
23 full writing out of the chorus, which is
24 one full writing out, but it's meant to
25 represent three, three choruses all the

1 JUDITH FINELL

2 way through. "Baby, remind me" is the
3 sixth phrase of that chorus.

4 Q. So "Baby, remind me" is at the
5 end of chorus 1, at the end of chorus 2
6 and appears twice in the final chorus,
7 correct?

8 MR. SANDERS: Object to form.

9 A. Well, it's not -- that final
10 chorus is not notated at all on my lyric
11 sheet.

12 Q. So you don't know?

13 A. I think in listening, I recall
14 that, but I would want to verify it.

15 Q. In the Paisley song, how many
16 different phrases incorporating the words
17 "remind me" are there?

18 MR. SANDERS: Object to form.

19 A. Okay. May I use the Paisley
20 lyrics that I received or am I supposed
21 to use Exhibit 5, because they differ?

22 MR. WARNOCK: Let's do it both
23 ways.

24 MR. HARVEY: Yeah.

25 Q. Look at them both. Exhibit 5

1 JUDITH FINELL

2 includes a word for word -- a side by
3 side with the actual recording. I don't
4 know what you've been provided by
5 Plaintiff's counsel that is part of your
6 notebook that we need to get a copy of.

7 But take a look at both, and
8 tell me, if you can, how many different
9 phrases incorporating the words "remind
10 me" there are in Paisley?

11 MR. SANDERS: Object to form.

12 A. It should be 19. But I'll
13 count it. I only count 18 here, but I
14 found 19 in the recording. But I don't
15 know if that's because it's part of the
16 fade-out or if I missed one in Exhibit 5.
17 But I counted 18 right now.

18 Q. Did you write out the lyrics of
19 either song?

20 A. No. I compared the lyrics of
21 the song to make sure they were accurate.
22 But I used the sheet music for itself for
23 reference of Paisley.

24 Q. Wouldn't that be a best
25 practice as a musicologist to write out

1 JUDITH FINELL

2 the lyrics yourself so you know that
3 you're looking at something that's
4 accurate?

5 MR. SANDERS: Object to form.

6 A. I did write out the lyrics that
7 seemed pertinent.

8 Q. In performing a musicological
9 analysis, why aren't all of the lyrics
10 important?

11 A. Because my focus was on the
12 relationship between the two songs. They
13 are important in an individual song, of
14 course, because it impacts the rhythms
15 and many other things. But in comparing
16 two musical works for relationship
17 between them, I focus on what's related
18 between them, not what is not.

19 Q. So you're focused on
20 similarities, not differences?

21 MR. SANDERS: Object to form.

22 A. It's assessing the
23 similarities. If there are similarities
24 that seem significant, then that's where
25 my analysis goes. If they seem

1 JUDITH FINELL

2 insignificant or generic, then I dismiss
3 them.

4 Q. If there are differences that
5 are significant, do you put those in your
6 report?

7 MR. SANDERS: Object to form.

8 A. Definitely, if there are
9 differences within the similar features,
10 I do point them out, how they distinguish
11 from one another.

12 Q. How many times does Connor use
13 the phrase "Oh, baby, remind me"?

14 MR. SANDERS: Object to the
15 form.

16 A. I think it's four. I will have
17 to count.

18 Q. How many times does Connor use
19 the phrase "Oh, baby, remind me"?

20 A. I am sorry, I didn't hear the
21 "Oh." I just thought it was "Baby,
22 remind me." I will have to look.

23 Q. Please look, and make sure the
24 answer is your own.

25 And while you're looking --

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 MR. HARVEY: Excuse me, I am
4 trying to make this quick,
5 Mr. Sanders.

6 MR. SANDERS: I want to get it
7 on the record.

8 Q. While you're looking, I want
9 you to look for the following phrases,
10 and you can confirm that none of these
11 phrases appear in Connor: "Oh, baby,
12 remind me"; "Oh, baby, remind me, yeah";
13 "Yeah, remind me"; "Baby, remind me,
14 yeah."

15 MR. SANDERS: Object to form.

16 A. Well, it contains "Baby, remind
17 me." It doesn't have the "Oh" and the
18 "yeah." I see nothing like that in -- at
19 least not in the lyrics sheet of Connor.

20 Q. So Connor includes --

21 A. But I should just say I am not
22 positive that it's not there in the
23 performance, but it doesn't appear to be
24 there.

25 Q. Take a look at Exhibit 5, and

1 JUDITH FINELL

2 if you want to, I want you to go ahead
3 and confirm for us that none of those
4 four phrases that I just read to you
5 appear in Connor.

6 A. Can you read them again,
7 please.

8 Q. "Oh, baby, remind me"; "Oh,
9 baby, remind me, yeah"; "Yeah, remind
10 me"; "Baby, remind me, yeah."

11 MR. SANDERS: Object to form.

12 A. You're saying that the preface
13 to "Baby, remind me" is what you're
14 asking about, and the subsequent word
15 after "Baby, remind me?"

16 Q. I'm asking about those four
17 distinct phrases that I just read to you;
18 I want you to confirm that none of those
19 phrases appear in Connor?

20 A. The key words occur "Baby,
21 remind me," but no, they don't have the
22 exclamation "Oh," or I think it was
23 "Yeah." No, they don't have that.

24 Q. Connor's singing of "remind me"
25 seven times is separated by other melodic

1 JUDITH FINELL

2 and lyrical expressions, correct?

3 A. I don't understand your
4 question.

5 Q. If you look at the choruses in
6 Connor, her singing of "remind me" seven
7 times is separated by other melodic and
8 lyrical expressions, correct?

9 A. It's always in two consecutive
10 phrases.

11 Q. Ms. Finell, confirm for me,
12 please, that only once in Connor is the
13 phrase "remind me," "Baby, remind me"
14 sung without separation?

15 A. Separation from what?

16 MR. SANDERS: Each other?

17 Q. From that phrase.

18 Confirm for me the phrase
19 "Remind me, baby, remind me" appears once
20 in Connor?

21 MR. SANDERS: Object to form.

22 A. I really don't understand your
23 question. Can you rephrase it, perhaps?

24 Q. How many times in Connor do the
25 words "Remind me, baby, remind me" occur

1 JUDITH FINELL

2 in that exact order?

3 A. Are you saying does "Baby,
4 remind me" immediately follow "Remind
5 me"?

6 Q. Those five words in order, how
7 many times in Connor do the words "Remind
8 me, baby, remind me" appear in that
9 order?

10 A. Well, on Exhibit 5, I see it --
11 well, it's "Remind me, baby, remind me"
12 on the second page, which is the closing
13 chorus.

14 Q. So once?

15 A. I'm not done.

16 Q. And that's the only time in
17 Connor where those five words appear in
18 sequence, correct?

19 A. I am still looking.

20 (Witness reviews document.)

21 A. Yes.

22 Q. So in every other iteration in
23 Connor, the words "Baby, remind me" are
24 always separated from the words "to
25 remind me," correct?

1 JUDITH FINELL

2 A. Yes, they are always at the end
3 of the chorus. The sixth phrase.

4 Q. And each time, except for that
5 one time that you just cited, "Remind me,
6 baby, remind me," being five words in
7 order, there is never an instance in
8 Connor where "remind me" is followed by
9 the words "remind me." It's always
10 separated by other words, correct?

11 A. Except for the one time in the
12 final chorus, that's correct.

13 Q. In Paisley, in the chorus, the
14 first chorus, "Remind me, remind me"
15 appears twice. Do you see that? Without
16 separation between those phrases.

17 A. In the lyrics, I think there is
18 some musical separation between them. I
19 would have to listen to the recording. I
20 think there is actually -- there are some
21 beats in between them.

22 Q. Lyrically.

23 A. But on the page, on the page,
24 yes, you're right.

25 Q. And that phrase "Remind me,

1 JUDITH FINELL

2 remind me" never appears in Connor, does
3 it?

4 A. You mean the words?

5 MR. SANDERS: Object to form.

6 Q. The four words, Ms. Finell,
7 "Remind me, remind me" never appears in
8 Connor, correct?

9 MR. SANDERS: Object to form.

10 A. That's two words. Are you
11 talking about the repeat of it? "Remind
12 me, remind me" as four words?

13 Q. I am not sure how this is hard.
14 Four words. "Remind me, remind me,"
15 those four words never appear in that
16 order in Connor, do they?

17 MR. SANDERS: Object to form.

18 A. Well, "Remind me" occurs. Not
19 "Remind me" repeatedly immediately
20 separate in the final chorus in Connor.

21 Q. Ms. Finell, please answer my
22 question, and we will get done quicker, I
23 assure you.

24 Nowhere in Connor do the four
25 words "Remind me, remind me" appear in

1 JUDITH FINELL

2 that order as they do in Paisley?

3 MR. SANDERS: Object to form.

4 A. No, they don't.

5 Q. And did you ever make a count
6 of how many times that occurs in Paisley,
7 where you have those four words "Remind
8 me, remind me" in order?

9 MR. SANDERS: Object to form.

10 A. They were distinct phrases.
11 Each of them was a separate phrase, so I
12 analyzed them as phrases, as iterations,
13 yes. That's what my whole index is
14 about.

15 Q. Ms. Finell, going up by a
16 third, in and of itself, is nothing
17 unique, right?

18 MR. SANDERS: Object to form.

19 A. I don't understand your
20 question.

21 Q. I am talking about your
22 contour, where you're talking about going
23 up and then down on the words "remind
24 me"; "mind" goes up and "me" goes down,
25 right?

1 JUDITH FINELL

2 MR. SANDERS: Object to form.

3 A. What's your question?

4 Q. Is there anything unique about
5 going up a third by itself from a "re,"
6 "mind"?

7 MR. SANDERS: Object to form.

8 A. It's not a third. It's a
9 fifth.

10 Q. Is it ever a fifth in Connor?

11 MR. SANDERS: Object to form.

12 A. One moment, I will have to
13 check. Are you talking about with the
14 words "remind me" only?

15 Q. Yes, ma'am. Those are the only
16 words you've been focused on all day. So
17 let's focus on those words right now.

18 A. No.

19 Q. It does not?

20 MR. SANDERS: Object to the
21 form.

22 Q. Using your Exhibit C, how many
23 times does "remind me" go up by a fifth?
24 And that's in the Paisley song.

25 A. Do you mean the entire "remind

JUDITH FINELL

me" or do you mean just the word
"remind," because that's what goes up by
a fifth?

Q. "Remind."

A. Thank you. Nine.

Q. And it never goes up by a
fifth, the word "remind me" never goes up
by a fifth in Connor?

A. Which word, "remind" or "me"?

Q. "Remind."

A. Thank you. No, it doesn't.

Q. It does not.

And six times in Paisley,
that's the difference between the two
songs, correct?

MR. SANDERS: Object to the
form.

A. I don't think I said six.

Q. You're right. You said nine.

For the nine times it goes up
by a fifth in Paisley and none in Connor,
that's a difference between the two
songs, correct?

MR. SANDERS: Object to form.

1 JUDITH FINELL

2 A. Yes.

3 Q. And in Connor, on "mind," she's
4 going up by a third to the second
5 syllable, right?

6 MR. SANDERS: Object to form.

7 Q. Excuse me, my mistake. She's
8 dropping by a third from "mind" to "me,"
9 correct?

10 A. What do you mean by "She's"?

11 Q. Ms. Connor.

12 A. Oh, Ms. Connor's song?

13 Q. The only female songwriter in
14 this lawsuit.

15 A. We're talking about from "mind"
16 to "me." I lost you in terms of which
17 syllables you're talking about.

18 Q. From "mind" to "me."

19 A. Thank you.

20 Q. She goes down by a third how
21 many times?

22 A. One -- I am counting it out
23 loud. Two times in minor third.

24 Q. And that's out of nine times?

25 A. Yes.

1 JUDITH FINELL

2 Q. And that's another difference
3 between Connor and Paisley?

4 MR. SANDERS: Object to form.

5 A. No. Paisley goes down by a
6 minor third also.

7 Q. And is that what you described
8 as the, having a descending leap of a
9 minor third?

10 A. Yes.

11 Q. And in the universe of melodies
12 in western music that have been written,
13 how many times do you think a melody has
14 included a descending leap of a minor
15 third?

16 MR. SANDERS: Object to form.

17 A. I don't know.

18 Q. There is nothing unique about
19 it, is there?

20 MR. SANDERS: Object to form.

21 A. You're talking about only four
22 or five notes. And that's the similarity
23 that I thought was significant, because
24 there are so few notes here. It's not a
25 gigantic number of notes or leaps. So

1 JUDITH FINELL

2 within that small number of notes with
3 the same identical lyrics and all, that's
4 noticeable.

5 Q. What other songs --

6 A. And in Paisley, it's done most
7 of the time. It doesn't have to imitate
8 every aspect of Connor to be similar.
9 That's one aspect that it did imitate
10 from "mind" to "me," minor third.

11 Q. In the songs that are titled
12 "Remind Me" or have the words "remind me"
13 in their lyrics, in the universe of
14 melodies in western music, how many times
15 do you think a melody had a descending
16 leap of a minor third?

17 MR. SANDERS: Object to form.

18 A. I have no way to answer that
19 question.

20 Q. And prior art would be required
21 to come up with an answer to that
22 question, correct?

23 MR. SANDERS: Object to form.

24 A. You mean where it went from the
25 second syllable of "remind" to "me" in

1 JUDITH FINELL

2 the same exact interval of a minor third?

3 Q. Yes, ma'am.

4 A. Yes, it would require research.

5 Q. And you have no idea if it
6 existed out there in the prior art, do
7 you?

8 A. I would be surprised if it
9 would be easy to find, especially what
10 the other similarities --

11 Q. You don't know because you
12 never looked, right, Ms. Finell?

13 MR. SANDERS: Object to form.

14 A. I felt it would not have been
15 useful to look because of all the
16 combined similarities that they share.

17 Q. Of the hundreds of songs titled
18 "Remind Me" registered with the United
19 States Copyright Office, you never looked
20 at a single other song except for
21 Paisley, did you?

22 MR. SANDERS: Object to form.

23 A. No. But I would be surprised
24 if they contained this many of between
25 seven or nine similarities that come

1 JUDITH FINELL

2 together in the same way that these two
3 correlate with each other. I would be
4 surprised if any of them have all of
5 those similarities together.

6 Q. You would be surprised? Okay.

7 MR. SANDERS: Object to form.

8 Q. Is there anything musicological
9 distinctive about going up and then down
10 on the words "remind me"?

11 MR. SANDERS: Object to form.

12 A. I don't know how to answer your
13 question.

14 Q. Is there anything
15 musicologically significant about there
16 being a musical contour of going up and
17 then down on two words consisting of
18 three syllables?

19 MR. SANDERS: Object to form.

20 A. It's one of the possibilities,
21 but the other possibility that the
22 songwriter could have done is to go down
23 and then up, or not go up or down, but to
24 stay on the same note. They didn't have
25 to -- they did not have to copy the, or

1 JUDITH FINELL

2 imitate the contour of the Connor song to
3 write their song. They had many options
4 available to them.

5 Q. Aren't there only three
6 possible musical contours, going up and
7 then down, repeating the same note or
8 going down and then up?

9 A. Yes.

10 Q. And there is nothing
11 musicologically distinctive about any of
12 those three, is there?

13 MR. SANDERS: Object to the
14 form.

15 A. It depends on the notes, the
16 rhythms, the harmonies. I would say that
17 some of the melodies that went down and
18 up by Beethoven or Mozart are pretty
19 distinctive, musicologically distinctive
20 and significant. And some of them went
21 down, some of them went up, some of them
22 stayed static.

23 Q. So let's stick with Connor and
24 Paisley and not Mozart right now.

25 But the scale degrees and

1 JUDITH FINELL

2 rhythms of "Remind me" in Connor and
3 Paisley are different, aren't they?

4 A. Some are different and some are
5 the same, but they aren't overall the
6 same.

7 Q. Can you point to any example,
8 between the two songs that are identical
9 in melodic rhythm and scale degrees?

10 A. It will take me a minute to do
11 that. Scale degrees I can do that
12 immediately, but it will take me time
13 with the rhythm.

14 Q. So the answer on scale degrees
15 is there is nothing identical between the
16 two songs in the composition of Remind
17 Me?

18 A. Just one moment, please.

19 Q. And my question is, so you
20 understand it while you look, it's in the
21 complete iteration.

22 A. Oh, that's a different
23 question, entirely.

24 Could you repeat the question,
25 then?

1 JUDITH FINELL

2 Q. We'll come back to that in a
3 second.

4 In the universe of melodies in
5 western music, Ms. Finell, how many times
6 do you think that a title has been
7 repeated in a chorus?

8 A. I don't understand your
9 question. A title lyric? What do you
10 mean?

11 Q. Do you know of any songs that
12 have notes as the title, Ms. Finell?

13 MR. SANDERS: Object to form.

14 A. I don't understand the
15 question.

16 Q. Can we agree that the title of
17 a song consists of words?

18 A. Yes.

19 Q. So in the universe of melodies
20 in western music over the last 100 years,
21 so limit it to the last 100 years, how
22 many times do you think a title is
23 repeated in a chorus?

24 A. You mean the title lyrics
25 repeated in a chorus?

1 JUDITH FINELL

2 Q. Let's try it this way,
3 Ms. Finell, because you have been a pro
4 at this since the early 1970s, and I
5 understand what you're doing.

6 So let me put it this way: In
7 Connor, the title of the song is "Remind
8 Me," correct?

9 A. Yes.

10 Q. Consists of words?

11 A. Mm-hmm.

12 Q. Paisley, the title is "Remind
13 Me," consists of words, correct?

14 A. Yes.

15 Q. In both songs the title is
16 repeated in the chorus, correct?

17 A. The title is, yeah. But it's
18 not just the title. It's set to music.
19 And it's not set to music in the title.

20 Q. And you use the example of
21 "Girls Just Want to Have Fun" as a
22 repeated title in a chorus, correct?

23 A. No. I called it a hook because
24 it has musical characteristics and
25 expression in the song. The title is

1 JUDITH FINELL

2 just words with no music.

3 Q. Okay. So let's focus on words
4 with no music.

5 In the universe of melodies,
6 western music in the last 100 years, how
7 many times do you think a title gets
8 repeated in a chorus?

9 A. There is no --

10 MR. SANDERS: Object to form.

11 A. There is no universal rule or
12 consistency, but it does get repeated in
13 a lot of popular songs with their
14 choruses.

15 Q. Is it commonplace, Ms. Finell,
16 for a title to be repeated in a chorus?

17 A. The title lyrics to be repeated
18 in the chorus and set to music, yes.

19 Q. Is it commonplace for a title
20 to be repeated in a chorus in country
21 music?

22 A. It's not the title. It's the
23 way it's set to music. It's the melody
24 that goes with it. That's different from
25 just saying the title.

1 JUDITH FINELL

2 Q. Ms. Finell, please answer my
3 question.

4 Is it commonplace in country
5 music for a title to be repeated in the
6 chorus?

7 A. The title lyrics set to music,
8 yes.

9 Q. And what about just in songs
10 that Brad Paisley wrote prior to 2008, do
11 you have any idea if he repeated the
12 title lyrics in chorus?

13 A. I do not know.

14 Q. Is that what you would call
15 prior art?

16 A. Just repeating, just the
17 concept of repeating, no. It's how it's
18 set to music and it's used that's
19 important. Not just that construct.

20 Q. Is there anything distinctive
21 musicologically about repeating the lyric
22 title in a chorus?

23 MR. SANDERS: Object to form.

24 A. It's not the repeating of it.
25 It's how it's used in a chorus that makes

JUDITH FINELL

it distinctive musicologically. It's the rhythms that are applied to it. It's the various ways that it scored. It's the phrasing that's used with it.

There is a lot more to it than just using the title lyrics. It's how they're used and how they are expressed that sets them apart from one another.

Q. I understand your point.

I am going to go back to the question I was trying to ask you before.

And I'll state it very carefully and ask you to listen to my question: Is there any iteration of the phrase "remind me" or the phrase "Baby, remind me" melody in Connor that is identical to any iteration of the "remind me" or "Baby, remind me" melodies in Paisley?

A. No.

Q. Is there any iteration of "remind me" or "Baby, remind me" scale degrees in Connor that is identical to those two phrases in Paisley?

1 JUDITH FINELL

2 A. Yes, there are a series of
3 scale degrees in both, especially in the
4 melisma sections that are identical
5 between the two.

6 Q. The entire phrase?

7 A. No, but there are consecutive
8 identical scale degrees.

9 Q. So in fairness, when I asked
10 you the question is there any iteration
11 of the "remind me" or "Baby, remind me"
12 scale degrees, the entire phrase in
13 Connor, that is identical to the
14 iteration of those phrases in Paisley,
15 the answer is no?

16 A. Right. You didn't ask it that
17 way the first time.

18 Q. Is there any iteration of the
19 "remind me" or "Baby, remind me" rhythmic
20 duration in Connor that is identical to
21 any iteration of those phrases in
22 Paisley?

23 THE WITNESS: Could you please
24 read that back.

25 (The reporter read back as

JUDITH FINELL

follows:

"QUESTION: Is there any iteration of the "remind me" or "Baby, remind me" rhythmic duration in Connor that is identical to any iteration of those phrases in Paisley?")

A. I don't understand the question. You mean the entire phrase or do you mean are there any individual rhythms?

Q. The entire phrase "remind me" and the entire phrase "Baby, remind me"?

A. Rhythmically? I don't believe so.

MR. HARVEY: Let's take a short break.

(Off the record.)

Q. Ms. Finell, back after the break. We had talked a little bit about melisma. Your report in paragraph 45 refers to the term double melismas, and so on, recurring constantly throughout these songs.

A. Yes.

1 JUDITH FINELL

2 Q. Would you please look at your
3 transcriptions of "Remind Me" in Exhibit
4 A, and can you tell me if there are any
5 double melismas in the Connor deposit
6 copy?

7 A. No, there are not.

8 Q. And in your report, you
9 understand that the demo version of the
10 Connor song is out of this case, correct?

11 A. Yes. But I didn't have that
12 information when I wrote the report.

13 Q. I understand. I am not casting
14 blame. I just want to make sure.

15 So of your report, Pages 14,
16 beginning with the caption Comparison 2,
17 running through the mid-part of Page 24,
18 is all about comparing Paisley with the
19 Connor demo copy, correct?

20 A. That's right.

21 Q. So we can just tear that out
22 and throw it away, correct?

23 A. I think there are some
24 references. It's been a while since I
25 wrote it. I believe there's some

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

references in there that say this is a similar kind of similarity as in comparison 1, but I'm not sure where I say that.

Q. But that is all about the demo copy of Paisley, correct?

A. No, what I am saying is that sometimes in this report, rather than being redundant, I referred to the other Connor song, sometimes. I think I said that, so I just wanted to make sure that you knew that.

Q. So the reference in your conclusions upon which your opinion is based on double melismas don't occur in the Connor deposit copy?

A. They do not.

Q. And mid Page 24 compares the Connor deposit copy with the Connor demo copy. So mid Page 24 through your summary on 25 is all about the demo copy comparison, correct?

A. Page 24, paragraph 40 to 43 are the comparison of the two different

1 JUDITH FINELL

2 Connor recordings.

3 Q. So paragraphs 40 through 43.
4 So we can agree that beginning at
5 paragraph 26 at Page 14 through paragraph
6 43 on Page 25 all have to do with
7 comparisons made to the demo copy, which
8 is not a part of this lawsuit, correct?

9 A. Well, sometimes it says they
10 share the same similarity. I would have
11 to look to see when I did that.

12 But to the extent that I am not
13 referring to the copyright deposit copy
14 version of Connor, yes, the other part is
15 referring to the demo.

16 Q. And your report seems to
17 suggest that a melisma is a unique
18 musicological device. It is not, is it?

19 MR. SANDERS: Object to the
20 form.

21 A. That is not what my report
22 meant to suggest.

23 Q. Okay. You agree that a melisma
24 is not a unique musicological device,
25 right?

1 JUDITH FINELL

2 MR. SANDERS: Object to the
3 form.

4 A. My report wasn't to make that
5 statement.

6 It was to point out the
7 similarities in the way that the melisma
8 was used in both songs.

9 Q. Did you consider scale degrees
10 of the word "me" to see if they were
11 similar or not between Paisley and
12 Connor?

13 A. I considered all the scale
14 degrees. But I don't know if I focused
15 on the ones having to do with the word
16 "me."

17 Q. Where did you write the scale
18 degrees for Connor?

19 A. I compared them, but I didn't
20 write the scale degrees out.

21 Q. In your report which compares
22 Paisley to the Connor deposit copy, which
23 is what's at issue in this case, so that
24 would be, would that be paragraphs 12,
25 beginning at Page 4 through paragraph 25

1 JUDITH FINELL

2 ending on Page 13?

3 A. Well, there is also the
4 conclusions and summary. Paragraph 12
5 to, what was the ending paragraph, you
6 said?

7 Q. On Page 13, ending at paragraph
8 25.

9 A. That's the separate section in
10 the report, but there are conclusions and
11 summary sections and the Exhibits that
12 also relate to these comparison.

13 Q. Yes, ma'am. You made a
14 specific comparison between the Connor
15 demo copy and the Paisley "Remind Me" in
16 paragraphs 12 through paragraph 25, Pages
17 4 through 13, correct?

18 A. No. It was Page 14 -- the demo
19 copy to Paisley is --

20 Q. No, ma'am. Listen to me.
21 Listen to me. We'll get this straight.

22 You identified the similarities
23 that you found between the Connor deposit
24 copy and the Paisley "Remind Me" in
25 paragraphs 12 through 25, Pages 4 through

1 JUDITH FINELL

2 13, correct?

3 A. Yes.

4 Q. All right. So that's the
5 universe of similarities that we can look
6 for in your report, correct?

7 A. Those are the findings. But as
8 I say, I also --

9 MR. SANDERS: Object to the
10 form.

11 A. -- I also gave the conclusions
12 of those findings in the beginning of the
13 report and the summary at the end.

14 Q. And your conclusions had to do
15 with both the demo copy and the deposit
16 copy, correct?

17 A. At times.

18 Q. Did you consider the rhythmic
19 durations of the pitches in the "me"
20 melismas in Connor and Paisley; did you
21 compare those?

22 A. One moment, please.

23 Q. And I will ask a question then
24 on that. While you're looking, I will
25 ask you to please compare the rhythmic

1 JUDITH FINELL

2 durations of the pitches in the "me"
3 melismas between the two songs.

4 MR. SANDERS: Object to form.

5 A. Well, the "me" melisma, may I
6 just spell it out, because it's hard to
7 generalize about those two questions all
8 at once.

9 Do you want me to just do it
10 one at a time, the scale degrees and then
11 the rhythms or all together?

12 Q. Just the rhythms, please.

13 A. Just the rhythms?

14 Q. Yes.

15 A. For me, only when it's a
16 melisma, right?

17 Q. Yes.

18 A. So in "remind me" iteration
19 Connor, iteration a2 is two 16ths and a
20 dotted 8th.

21 Q. Isn't it two 32nds?

22 A. You're right. It's late in the
23 day. I need my glasses. Okay, yes.
24 Excuse me.

25 And that's a2. The same thing

1 JUDITH FINELL

2 is true of a5. Okay. So that's --

3 Q. And for the two examples that
4 you've just given, those are the only
5 examples of the use of a melisma in
6 Connor, correct?

7 A. Yes.

8 Q. So in two out of nine
9 iterations of "remind me," only two out
10 of nine iterations she used a melisma,
11 correct?

12 A. No, only for the word "me."
13 She uses it for "mind," also.

14 Q. So for the use of the word
15 "me," she used a melisma of two out of
16 nine, correct?

17 A. Yes.

18 Q. And she used them the same way?

19 MR. SANDERS: Object to the
20 form.

21 A. Pardon?

22 Q. And she used the melisma in the
23 same way, in those two examples?

24 A. Yes.

25 Q. Earlier today you identified

1 JUDITH FINELL

2 the sheet music that you had taken a look
3 at for Paisley. And that is Exhibit
4 number 2. Take a look at that, please.

5 A. Okay.

6 Q. And I see on here that numbers
7 have been assigned 1 through 7, correct?

8 A. Yes.

9 Q. And is it correct that in
10 keeping with musicological practices,
11 that assigning numbers 1 through 7 to
12 notes on a C major scale is common to
13 cover pitch?

14 A. I don't understand your
15 question.

16 Q. If somebody is charting pitch,
17 is it common musicological practice to
18 assign numbers 1 through 7 to notes?

19 A. Yes. That's called
20 representing the scale degrees.

21 Q. And that's what was done by you
22 or someone on your staff to the Paisley
23 song, correct?

24 A. Right, comparing it to the
25 recording.

1 JUDITH FINELL

2 Q. And that's what you do as a
3 matter of practice?

4 A. Well, not always. There is not
5 usually sheet music available. But when
6 there is, we compared it.

7 But my musical examples were
8 not taken from the sheet music, because
9 there were mistakes in the sheet music.
10 My musical examples are taken from the
11 recording.

12 Q. You didn't prepare a scale
13 degree chart for Connor, did you?

14 A. No, except the iterations that
15 I show in my, throughout my report.

16 Q. Are the pitch sequences in the
17 melodies in the choruses in Connor and
18 Paisley significantly similar from a
19 musicological perspective?

20 MR. SANDERS: Object to form.

21 A. This is 10 pages of music in
22 Paisley. And there are probably some
23 pitch sequences. And I am sure they are
24 the same. I know there are sequences
25 like 3/2/1 and others that are similar.

1 JUDITH FINELL

2 And certainly, there is 1 and 6 that is
3 very common in the use of Paisley's hook
4 that I am sure I would also find at times
5 in Connor.

6 But I haven't done that
7 analysis in that way where I've basically
8 written down every single pitch that
9 Connor sings.

10 Q. Are the pitch sequences in the
11 melodies and the opening melodic phrase,
12 the first line of the chorus in Connor,
13 are they significantly similar as the
14 opening phrase in the chorus of Paisley?

15 A. You mean for the words in
16 Connor "All it takes is one kiss to
17 remind me," that phrase?

18 Q. Is that how you would define
19 the first melodic phrase in Connor?

20 A. In the chorus not -- that is
21 preceded by the verse.

22 Q. Looking at the chorus, is that
23 how you would define the first melodic
24 phrase in the chorus of Connor?

25 A. Yes.

1 JUDITH FINELL

2 Q. As being the first line?

3 A. Yes, that's right.

4 Q. And would you define the second
5 melodic phrase in chorus 1 of Connor as
6 the second line?

7 A. With the lyrics "All I need is
8 your touch to remind me."

9 Q. So you define that to be the
10 second phrase?

11 A. That's right.

12 Q. In Paisley, and if you refer to
13 Exhibit 5, if you look at chorus 1, would
14 you define the first melodic phrase to be
15 "Been so long that you forget the way I
16 used to kiss your neck"?

17 A. I think the phrase is probably
18 -- I would have to look at the music to
19 see if they take a breath after you
20 forget.

21 Q. Well, take a look at the music
22 that you had the sheet music on, which is
23 Exhibit number 2.

24 A. Yeah, I would say those are two
25 phrases.

1 JUDITH FINELL

2 Q. All right. So you think those
3 two lines are two different phrases?

4 A. Yes. And they are closely
5 related. I am not sure. I would have to
6 -- it could be either way. But it does
7 -- the first "forget" ends on the tonic.

8 So it's hard to say, because it
9 doesn't look like it's broken, but
10 probably in singing, he probably takes a
11 breath there. I would have to hear it.

12 Q. It's based on where the singer
13 takes a breath?

14 A. In vocal music, often that's
15 where the phrase changes. Sometimes
16 there is a rest to indicate that.

17 Q. So are the pitch sequences in
18 the first melodic phrase in the chorus in
19 Connor the same or significantly similar
20 to the pitch sequences in the first
21 melodic phrase of Paisley in the chorus?

22 MR. SANDERS: Object to form.

23 A. I have to try to remember the
24 chorus, because I didn't write that down.
25 No.

1 JUDITH FINELL

2 Q. You testified that the rhythmic
3 durations of the notes in the melisma in
4 Connor for the word "me" consist of two
5 64th notes followed by a dotted 8th note,
6 correct?

7 A. Just one moment. Let me get
8 that. Which iteration?

9 Q. The melisma on the word "me."
10 This is Exhibit A to your report. And I
11 believe the two melismas you identified
12 were a2 and a5.

13 Let me back up, and I will ask
14 the question again.

15 You stated that the
16 transcriptions on a2 and a5 showing a
17 melisma on the word "me" in Connor are
18 identical, correct?

19 THE WITNESS: Could you repeat
20 the question, please?

21 (The reporter read back as
22 follows:

23 "QUESTION: You stated that the
24 transcriptions on a2 and a5 showing a
25 melisma on the word "me" in Connor are

1 JUDITH FINELL

2 identical, correct?")

3 A. Yes.

4 Q. And they are the only melismas
5 for the word "me" in Connor, correct?

6 A. Yes.

7 Q. And you testified that the
8 rhythmic durations of that use of the
9 melisma on the word "me" in Connor
10 consist of two 64th notes followed by a
11 dotted 8th note?

12 A. It should be two 32nds followed
13 by a dotted 8th note.

14 Q. Two 32nd notes followed by a
15 dotted 8th note?

16 A. Yes.

17 Q. And does that rhythm appear in
18 any melisma in Paisley, on the word "me"?

19 A. No.

20 Q. Let me ask you some questions
21 about prior art.

22 And you again, performed no
23 prior art search in this case, correct?

24 A. Correct.

25 Q. In your work as a musicologist,

1 JUDITH FINELL

2 how would you go about searching for
3 prior art?

4 A. First, I would have to identify
5 what I am looking for. If I am comparing
6 two pieces of music and they have certain
7 properties that are similar, those are
8 the properties that would become the
9 subject matter of my search. And it
10 would differ with every single
11 comparison.

12 Q. Let's assume as a hypothetical
13 that you were asked to go find prior art
14 or assume there was prior art for Connor.
15 If you were asked to determine if Connor
16 used themes, or music, or lyrics or some
17 combination that had been used in earlier
18 songs, what would you do to go looking
19 for prior art?

20 MR. SANDERS: Object to form.

21 Q. Or to determine if prior art,
22 in fact, existed?

23 A. What I looked for -- I mean, my
24 process, in essence, I would make a list
25 of all the properties that I find same or

JUDITH FINELL

similar between the two. And those, that would be my, so to speak, shopping list for prior art.

In this case, it would be that the word "remind" has a bar line in between it. It extends over the bar line. I would look for the fact that "mind" is always the highest pitch in the phrase. Say if I were to isolate groups of songs that had the terms "remind" or "remind me" in them, I'd be looking for those kinds of characteristics, including appoggiaturas, including leaps down of minor 3rds.

Basically, all the similarities that they have in common is what I would be looking for in prior art. As many as possible.

I don't think I would find all of them, but that's what I would look for.

And then if I found a song that, at least in one phrase, had all of the similarities that I've outlined, the

JUDITH FINELL

next thing I would do is to look at the song as a whole, that I am comparing the prior art, and see if there are partner phrases in existence, also, if there are phrase sets and other kinds of similarities that I pointed out.

So I basically would be looking for all of those properties, but especially, even if I didn't find the bigger similarities in terms of the phrase sets and the partner phrases, I would want to know that at least the individual phrase that was similar and possibly a candidate for prior art had all the same musical -- melody characteristics that I found between these.

Q. Is it your position that prior art must contain every single similarity that have you identified between two songs?

A. It's not always possible to find that. But sometimes an investigator for prior art finds fragmentary

JUDITH FINELL

1 similarities. So that in one group you
2 find similar rhythms, in another group
3 you find similar other devices, et
4 cetera.
5

6 But to be legitimate, when
7 you're comparing pieces of music that
8 have so many, such a collection of
9 similarities as these do, I would say it
10 should have at least the majority. Say
11 if you have eight, it should have at
12 least five or six to be seriously
13 considered. It shouldn't have one or
14 two.

15 Q. Assume that --

16 A. I mean, that's just how I look
17 at it.

18 Q. Assume that Connor has written
19 the phrase "Remind Me," adopted as a
20 title, and assume there is another song
21 that predates hers named "Remind You"
22 with identical music underneath those two
23 words and those three syllables. Would
24 you consider that to be prior art?

25 A. What do you mean by "identical

JUDITH FINELL

music," because one her characteristics is that she keeps changing the melody for her hook lyrics.

Does it change the melody, too?
See, it's a matter of judgment.

Q. For both songs, melodies change throughout both of them, correct?

A. Well, as I said, first you look at the sort of the granular level. If the greatest similarity between them is the shared lyrics and the way those lyrics are set in isolated phrase, and you find that, then you start to look beyond that into the rest of the prior art of that song, and see if it has other characteristics that are on a bigger level beyond just the isolated phrase.

Basically, you're trying to see how wide a net. So if it said "remind you," I would already say well, lyrically, it's not as close as these are to each other. But maybe if the same, if the same melody occurred rhythmically, and in terms of the appoggiatura clashing

JUDITH FINELL

with the harmony, et cetera, then, you know, that would be in a group, that might be a candidate. But that's theoretical. I never found that.

Q. You expressed your view about what prior art is.

Is your view, that you stated a moment ago, endorsed in any musicological treatise?

A. Well, musicology was not designed for copyright infringement disputes. It's a discipline that is in order to understand, analyze and delve into a scholarly level about music.

So terms like prior art and all, that is really a legal, if you will, a legal construct that's imposed on or combined with the musicological field. Especially, when I was at University of California, I mean, there was no such thing as forensic musicology. I don't think there still is in that way, certainly not where I graduated from.

So it's not a matter of taking

1 JUDITH FINELL

2 courses in how to determine substantial
3 similarity, or prior art or any of those
4 defenses.

5 Q. Okay. Ms. Finell, thanks for
6 that two-page answer.

7 I will ask you again: Is the
8 view you expressed a few moments ago
9 about prior art endorsed in any
10 musicological treatise; yes or no?

11 MR. SANDERS: Object to form.

12 A. I've never looked for it.

13 Q. So you have no idea?

14 A. I have no idea.

15 Q. Did you do anything to
16 determine if elements in Connor were
17 taken from the public domain?

18 A. No. Except my own knowledge,
19 but I did not, I did not search for it,
20 no.

21 Q. Do you agree that without
22 conducting a prior art search, there is
23 no basis for finding that the Connor
24 chorus is original or distinct?

25 MR. SANDERS: Object to the

1 JUDITH FINELL

2 form. Legal conclusion.

3 A. It's distinct. I don't need to
4 do prior art to say that it's distinct.

5 Original, it would require
6 prior art investigation, yes.

7 Q. Are the similarities distinct?

8 MR. SANDERS: Object to the
9 form.

10 A. I don't understand. Do you
11 mean --

12 Q. The same question here. Would
13 you agree that without conducting a prior
14 art search, there is no basis for
15 refining that the similarities are
16 distinct between Connor and Paisley?

17 MR. SANDERS: Object to the
18 form.

19 A. I don't understand what your
20 question means.

21 Q. You conducted no prior art
22 search about Connor; therefore, you
23 cannot say whether the similarities that
24 you identified between Connor and Paisley
25 are distinct, correct?

1 JUDITH FINELL

2 MR. SANDERS: Object to the
3 form.

4 A. What do you mean distinct? I
5 don't understand it.

6 Q. Ms. Finell, you're the one who
7 has been using the word distinct.

8 A. I used the word distinctive.

9 Q. All right.

10 A. I am sorry, but it does have a
11 different meaning to me.

12 Q. Okay. Same question, but using
13 the word distinctive: You conducted no
14 prior art search between these two songs.

15 You have no basis to say that
16 the similarities you have identified
17 between Connor and Paisley are
18 distinctive, do you?

19 MR. SANDERS: Object to the
20 form.

21 A. Do you mean distinctive musical
22 features?

23 Q. Yes.

24 A. Well, what I -- I don't think I
25 would find any prior art that combined

JUDITH FINELL

all of the similar musical features; and therefore -- I mean, that they would, these two songs would stand apart from other prior art, because I don't think it would be likely to find other art that contains every single of the same similarities in the same way that I found here. I think that would be quite unlikely.

Q. Have you been engaged to provide a rebuttal report to a report prepared by musicologists for the Defendants?

A. I've never seen a rebuttal report.

Q. It's not due yet.

A. Oh, okay. I just thought did I miss something.

Q. You will see it, I am sure.

Have you been engaged by the Plaintiff's counsel to provide a rebuttal report to a report prepared by a musicologist engaged by the Defendants?

A. No.

1 JUDITH FINELL

2 Q. Assuming that Dr. Larry
3 Ferrara, who you know and who is present
4 with us in the room today, prepares a
5 report, have you been engaged to prepare
6 a rebuttal report to his report?

7 A. Not yet.

8 Q. Where is it written in
9 musicological treatises that only works
10 that share a majority of similar features
11 or elements are relevant?

12 A. Relevant for what?

13 Q. Relevant for purposes of your
14 comparison to make a -- draw an opinion
15 about substantial similarity?

16 A. I have no idea. It's just --
17 it is the criteria that I applied when I
18 look for prior art.

19 Q. Do you know of anybody else who
20 applies your criteria?

21 A. I would say the majority of
22 musicologists who address copyright
23 issues do.

24 Q. Okay. You're speculating,
25 right, because you don't know?

1 JUDITH FINELL

2 MR. SANDERS: Object to the
3 form.

4 A. Well --

5 Q. You cannot identify other
6 musicologists who have adopted your view?

7 MR. SANDERS: Object to the
8 form.

9 A. Just in the cases that I have
10 been involved with for 25 years, that's
11 what I've observed in my experience.

12 Q. List them. Tell me which
13 musicologists?

14 A. Who apply -- who look for a
15 majority of similar features?

16 Q. Yes. In your testimony, you
17 were talking about prior art, you were
18 talking about all similar features?

19 A. I didn't say "all." I said
20 "majority."

21 MR. SANDERS: Object to the
22 form.

23 A. I said "majority." I said if
24 there are eight similar features, I would
25 say something like they should have at

1 JUDITH FINELL

2 least more than half.

3 Q. So you're changing from "all"
4 to "a majority"?

5 A. I am not changing it. I said
6 more than half.

7 Q. And in the Connor deposition,
8 she was played a number of recordings of
9 the phrase "remind me" sung in a number
10 of other works.

11 Was that disclosed to you by
12 the Plaintiff's counsel?

13 A. No.

14 Q. Did you listen to any
15 recordings played for the Plaintiff at
16 her deposition?

17 A. May I -- excuse me, I have
18 something to correct in what I just said
19 a moment ago. Is this --

20 MR. SANDERS: I think you need
21 to answer his question, and then you
22 can correct.

23 A. Okay. Excuse me. Can you
24 repeat it, please.

25 MR. HARVEY: Read it back.

1 JUDITH FINELL

2 (The reporter read back as
3 follows:

4 "QUESTION: Did you listen to
5 any recordings played for the
6 Plaintiff at her deposition?")

7 A. Did I hear them; is that what
8 you said?

9 (The reporter read back as
10 follows:

11 "QUESTION: Did you listen to
12 any recordings played for the
13 Plaintiff at her deposition?")

14 A. Never, no.

15 Q. Is it your testimony --

16 MR. SANDERS: You had a
17 correction?

18 Q. What's your correction?

19 A. A moment ago, you said I said
20 "all." And I said "a majority." Let me
21 just clarify that.

22 I said I thought it would be
23 very unlikely to find prior art that
24 contained all of the similarities that I
25 found between the two songs at issue

1 JUDITH FINELL

2 here, but I said in terms of looking for
3 prior art and my methodology and process,
4 I would look for prior art containing at
5 least a majority of the similarities.

6 So I wanted to clarify that so
7 that I didn't misstate my own testimony.

8 Q. Ms. Finell, why didn't you go
9 looking for identical or similar titles
10 as the Connor song?

11 A. It wasn't within the scope of
12 my work. And I also didn't feel I would
13 find music that had the combination of
14 similarities that are present here. It
15 would have been very incomplete to just
16 look for titles of songs containing
17 "remind me."

18 Q. Have you ever testified that
19 Whether there is prior art that existed
20 for the Claimant's work is a standard for
21 determining copyright infringement?

22 MR. SANDERS: Object to form.

23 THE WITNESS: Could you read
24 that back, please?

25 (The reporter read back as

JUDITH FINELL

follows:

"QUESTION: Have you ever testified that Whether there is prior art that existed for the Claimant's work is a standard for determining copyright infringement?")

MR. SANDERS: Also a legal conclusion.

A. No, I don't understand the nature of your question.

Q. Sure, you do.

Have you ever testified that "Whether there is prior art that existed before the Claimant's work is a standard for determining copyright infringement"?

A. What do you mean whether there is prior art. I don't understand the structure of your question. I am sorry.

Q. Would you agree that whether there is prior art is something that would need to be considered to determine whether there has been copyright infringement?

MR. SANDERS: Objection to the

1 JUDITH FINELL

2 form of the conclusion.

3 A. I don't remember if I have or
4 not.

5 Q. Different question. Have you
6 ever spoken those words under oath that
7 "Whether there is prior art that existed
8 before the Claimant's work is a standard
9 for determining copyright infringement";
10 yes or no?

11 MR. SANDERS: Object to the
12 form.

13 A. I wouldn't testify on a legal
14 -- I am not a lawyer. I wouldn't have
15 testified on something that involves
16 legal opinions like that.

17 Q. So you had not said that
18 before?

19 A. I might have said something
20 like that. But I wouldn't -- I
21 definitely wouldn't cite a legal
22 standard. I don't have -- I am not a
23 lawyer. If I did say something like
24 that, I didn't mean it as a legal
25 opinion.

JUDITH FINELL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q. Have you published any books about music theory or analysis?

A. Well, I published books, but -- a book, but it wasn't on music theory and analysis.

Q. And what book did you publish?

A. It was commissioned by the New York State Council on the Arts and it was called the Contemporary Music Performance Directory.

Q. So you have published no books about music theory and analysis, correct?

A. Articles, I have, but not books.

Q. Have you had any articles published in peer-reviewed scholarly journals of music?

A. No. In copyright journals and lawyer publications. Lawyers' publications.

Q. So you have had no articles published in peer-reviewed scholarly journals of music, correct?

A. Correct.

1 JUDITH FINELL

2 Q. We can cut out at least one of
3 these questions if you answer the first
4 one. So let me keep at it.

5 Have you sat on the editorial
6 board of any peer-reviewed scholarly
7 journals of music?

8 A. Yes, I did.

9 Q. Which one?

10 A. American Music Center.

11 Q. American --

12 A. The American Music Center.

13 Q. Is that a scholarly journal?

14 A. Oh, yes, at the time I was
15 involved with it, it was.

16 Q. What is it now?

17 A. Now it's -- it's an
18 organization, an advocacy organization
19 for American composers.

20 Q. What was your title?

21 A. My title changed over the years
22 that I worked there, but eventually, I
23 was director of publications.

24 Q. Are you a member of the
25 American Musicological Society?

1 JUDITH FINELL

2 A. No.

3 Q. Are you a member of the Society
4 For Music Theory?

5 A. No.

6 Q. And your master's was obtained
7 in musicology in 1970?

8 A. Yes.

9 Q. Since 1970, you had no other
10 formal education in musicology, correct?

11 A. In musicology without
12 copyright, no.

13 I have been to many, many
14 professional seminars and conferences on
15 the application of copyright and music,
16 but no further degrees.

17 Q. No formal education since 1970?

18 A. I consider that formal. Most
19 of the people attending get professional
20 credit and pay for it. Pay for the
21 education.

22 Q. No degree-qualifying studies
23 since 1970, correct?

24 A. That's right.

25 Q. Generally, do you consider the

1 JUDITH FINELL

2 most recent Harvard Dictionary of Music
3 as authoritative?

4 A. Yes.

5 Q. Generally, do you consider the
6 most recent printed version of the Grove
7 Dictionary of Music and Musicians to be
8 authoritative?

9 A. Yes.

10 Q. The same question for the
11 Oxford Dictionary of Music?

12 A. Yes.

13 Q. Same question for Ronald
14 Rosen's Music and Copyright?

15 A. I don't know about that book.

16 Q. Are you aware of any
17 peer-reviewed literature that
18 musicologists regularly consult regarding
19 music analysis?

20 A. You mean involving copyright or
21 musical analysis without copyright?

22 Q. Involving the sort of
23 musicological analysis that you performed
24 in this case.

25 THE WITNESS: Could you repeat

1 JUDITH FINELL

2 the question, please?

3 (The reporter read back as
4 follows:

5 "QUESTION: Are you aware of any
6 peer-reviewed literature that
7 musicologists regularly consult
8 regarding music analysis?")

9 A. There are many different
10 publications that, on music theory and
11 analysis. But they're not usually
12 written from the standpoint of copyright
13 law.

14 Q. So to get to the answer --

15 A. I use many theory textbooks as
16 substantiation for my work. I am not
17 aware of a book, as you describe it.

18 Q. Ms. Finell, in your report in
19 this case, Exhibit number 1, no scholarly
20 articles or books are referred to.

21 Did you consult any scholarly
22 journals, or articles or sources in
23 conjunction with preparing your report in
24 this case?

25 A. Yes. In terms of some of the

1 JUDITH FINELL

2 terminology and definitional work, yes,
3 definitely.

4 Q. So some of the definitions you
5 copied out of some source?

6 MR. SANDERS: Object to form.

7 A. I didn't copy anything, but I
8 consulted them to make sure, in terms of
9 what I was interpreting.

10 Q. Which one?

11 A. I don't remember, but I have a
12 whole library full of them.

13 Q. But you don't recall --

14 A. I use the Harvard Dictionary.
15 I use my music theory textbooks. It
16 depends on what I am looking at. If I am
17 looking at harmonic relationships, I have
18 different ones.

19 Q. In connection with the report
20 in this case, did you consult
21 specifically any authoritative journal or
22 book?

23 A. I don't remember the titles,
24 but for appoggiatura and some of the
25 other devices that I described here, I

1 JUDITH FINELL

2 did look them up, yes.

3 Q. What did you look up for
4 appoggiatura?

5 A. Well, I looked up the
6 application of appoggiatura in various
7 reference books. I am not quite sure
8 which ones I used.

9 Q. You're not sure which ones.
10 As a musicologist, do you tend
11 to specialize in a particular genre of
12 music?

13 A. No.

14 Q. Do you think musicologists tend
15 to specialize in a particular genre of
16 music?

17 MR. SANDERS: Object to form.

18 A. Academic ones do. But I'm not
19 an academic musicologist.

20 Q. What about musicologists who
21 are nonacademic, do they tend to
22 specialize in a particular genre of
23 music?

24 A. They might. But I don't know
25 too many who are nonacademic.

1 JUDITH FINELL

2 Q. Have you ever testified that
3 musicologists tend to specialize in a
4 particular genre of music?

5 A. Pardon?

6 Q. Have you ever testified that
7 musicologists tend to specialize in a
8 particular genre of music?

9 A. I probably have, yes. That's
10 during their academic training, just like
11 I did in order to write a thesis.

12 Q. In the -- strike that.
13 How many hours have you spent
14 in connection with preparing your report
15 in this case?

16 A. I do not recall.

17 Q. How much have you been
18 compensated by the Plaintiff's counsel in
19 connection with your preparation of the
20 report in this case, or testimony in this
21 case?

22 A. I've been working for the
23 Plaintiff since 2013. I really don't
24 have my records here. Although at the
25 end of my report, it does discuss the

1 JUDITH FINELL

2 compensation.

3 Q. Yes. And can you give me a
4 ballpark, please, of how much you have
5 been compensated in preparation of your
6 report and testimony in this case?

7 A. You mean the second report or
8 both?

9 Q. Both, please.

10 A. I am sorry, I don't know. I
11 don't have those records with me.

12 Q. More than \$20,000, more than
13 \$50,000, less than \$2,000?

14 A. Let me see what I said at the
15 end of the report.

16 Q. You did not tell us how much
17 you have been paid. I am asking you now.

18 A. I am sorry, I don't have those
19 records with me.

20 Q. What's your ballpark?

21 MR. SANDERS: Can you estimate
22 without speculating?

23 THE WITNESS: I'd d be
24 speculating.

25 Q. Is there any portion of your

1 JUDITH FINELL

2 compensation in this case related to the
3 outcome of the case?

4 A. Not at all.

5 Q. Musicology opinions are not
6 related to --

7 MR. HARVEY: Mr. Sanders, what
8 I'd ask is that we leave a blank in
9 the deposition right there for how
10 much she's been paid from the
11 beginning of the case up through now,
12 if you don't mind.

13 (Production request for how much
14 Ms. Finell has been paid from the
15 beginning of the case up through now
16 indexed.)

17 MR. SANDERS: That's fair.

18 MR. HARVEY: And that would be a
19 late filed for purposes of giving that
20 to the --

21 MR. SANDERS: Just put it in the
22 errata?

23 MR. HARVEY: The errata would be
24 fine.

25 MR. SANDERS: Thank you.

1 JUDITH FINELL

2 MR. HARVEY: You intend to have
3 her read and sign?

4 MR. SANDERS: Yes. And just to
5 help, just remind me.

6 MR. HARVEY: Thank you, I will.

7 MR. SANDERS: I'm so sorry. If
8 you could just send me something to
9 jog my memory.

10 MR. WARNOCK: We were thinking
11 put in a blank that says to be
12 furnished.

13 MR. HARVEY: If she reads and
14 signs, then, okay.

15 Q. Musicology opinions are not
16 related to how the Defendants created
17 their song; is that correct?

18 A. I don't understand.

19 Q. Okay. Is your conclusions, do
20 they have anything to do with how the
21 Defendants created their own song, the
22 Paisley "Remind Me"?

23 A. You mean if they wrote it at a
24 piano or in the studio? I don't know
25 what you mean by how they created it.

1 JUDITH FINELL

2 Q. Did you listen to the
3 recordings of the process of the creation
4 of Paisley?

5 A. Never, no.

6 Q. Did you analyze the creation
7 process of Paisley?

8 A. No. I know nothing about it.

9 Q. And you never read any of the
10 Defendants' testimony?

11 A. No.

12 Q. Are you aware of testimony that
13 the music portion of Paisley was written
14 entirely by Brad Paisley and not by Kelly
15 Lovelace or Chris DuBois?

16 MR. SANDERS: Object to form.

17 A. I don't think I knew that ever.

18 Q. Do you believe it's possible
19 that the Paisley "Remind Me" was created,
20 as they have testified, that Paisley
21 wrote all of the music of Paisley?

22 MR. SANDERS: Object to the
23 form.

24 A. Do you mean the lyrics in the
25 music or just the melodies?

1 JUDITH FINELL

2 Q. The melodies.

3 A. It's possible. It depends on
4 their process.

5 Q. In your report, you do not use
6 the word infringement.

7 Do you intend to use the word
8 infringement at trial or in a declaration
9 in this case?

10 MR. SANDERS: Object to form.

11 A. I don't know if I'll be asked
12 to or not. But I see that as more of a
13 legal conclusion.

14 Q. So --

15 A. I would use words like similar.
16 That would be more appropriate, I think.

17 Q. So you do not intend to express
18 any opinions about whether any of the
19 Defendants infringed on the Plaintiff's
20 song, correct?

21 A. I am not sure how the word
22 infringe is defined, if that's -- but if
23 that's considered a legal conclusion,
24 then I would not, it wouldn't be
25 appropriate for me to do that. I don't

1 JUDITH FINELL

2 really know how.

3 Q. In your report, you use the
4 word copied.

5 A. Mm-hmm.

6 Q. Which Defendant do you claim
7 copied any element of Connor?

8 MR. SANDERS: Object to form.

9 A. Would you mind telling me what
10 page you're looking at?

11 Q. Paragraph 46, you state "These
12 collective similarities in both Connor
13 and Remind Me-Paisley point sharply to
14 copying."

15 A. Okay. That's not the same
16 thing as saying they copied. It's just
17 that it's suggesting that there was
18 copying. I wrote it that way for a
19 specific meaning.

20 Q. You wrote it that way to
21 suggest that somebody copied?

22 A. I meant that the similarities
23 suggested that there is copying. Not
24 that I am suggesting it.

25 Q. What Defendant are you

1 JUDITH FINELL

2 suggesting copied?

3 MR. SANDERS: Object to form.

4 A. Whoever composed the music.

5 "The music" meaning music and lyrics
6 which are married. But I am just saying,
7 whoever composed the composition itself.

8 MR. HARVEY: Why don't we take a
9 quick break.

10 (Off the record.)

11 Q. Ms. Finell, are there any
12 materials that you relied upon in forming
13 your opinions that have not been
14 disclosed to me?

15 A. No.

16 Q. Did you reach any conclusions
17 or opinions that you later rejected in
18 coming up with your final report?

19 A. No.

20 Q. Can you tell me how your --
21 strike that.

22 You are not saying that the
23 entirety of Paisley is substantially
24 similar to Connor, are you?

25 MR. SANDERS: Object to the

JUDITH FINELL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

form.

A. No.

Q. Just the fragments "remind me" and "Baby, remind me" are what you concluded are substantially similar?

MR. SANDERS: Object to the form?

A. I don't consider them fragments. They are the primary identifiers of each song.

Q. So just the words "remind me" and "Baby, remind me" combined with the music is what you determined, in your opinion, to be substantially similar?

MR. SANDERS: Object to the form.

A. Those are the essence of each song, yes.

Q. In your opinion, right?

A. Yes.

Q. Let me direct your attention to paragraph 46 of your final report.

A. Paragraph 46?

Q. Yes, ma'am. And that's on Page

1 JUDITH FINELL

2 25, running over to 26.

3 Do you agree with me that
4 lyrics are words?

5 A. Yes.

6 Q. And you acknowledged today that
7 lyrics are distinct from music, correct?

8 A. In music, there is a
9 combination -- there is what I would call
10 a marriage of words in music when it's
11 vocal music.

12 Q. I understand that your
13 conclusions in this case are based on
14 what you consider to be the marriage of
15 music and lyrics, correct?

16 A. Yes.

17 Q. Lyrics, in your view, as a
18 musicologist, are distinct from the
19 music, correct?

20 MR. SANDERS: Object to the
21 form.

22 A. The lyrics and the syllable
23 count of lyrics and even the rhythms of
24 the lyrics have an impact on the music
25 that's set -- that sets them and vice

1 JUDITH FINELL

2 versa. It's intertwined. I don't see
3 them as completely separate art forms.

4 Q. As a hypothetical, Ms. Finell,
5 and in your experience as a musicologist,
6 if I want to license the music of a song,
7 independent of licensing the lyrics of a
8 song, I may do so, correct?

9 MR. SANDERS: Object to the
10 form.

11 A. I think it depends on the deal
12 between the creators of the song,
13 frankly. But sometimes you can license
14 them separately.

15 Q. You understand what an
16 instrumental version of a song is?

17 A. Yes.

18 Q. Can you recite the words and
19 not play the music of a song?

20 A. Can a person do that?

21 Q. Yes, ma'am.

22 A. Yes.

23 Q. So if you wanted to recite the
24 lyrics of Connor "Remind Me," you would
25 read the lyrics off of either Exhibit 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JUDITH FINELL

or off the lyric sheet that you have provided, or prepared by Ms. Connor, correct?

A. Yes.

Q. So you could recite those words separate from singing any part of the music, correct?

A. Oh, yes.

Q. Can you play the music of Connor and not include the words?

A. Not exactly, because the words are set to melodies. What would you do, just hum it and not include the words? I mean, if you're trying to convey the way the melodies are, they are setting the words. So it's hard to separate them. So in a vocal piece, it's hard to separate them. But you could. Of course, you could play it on an instrument instead.

Q. So as a musicologist, you understand that the music of a song can be played independently of the words, correct?

1 JUDITH FINELL

2 A. It can be -- I'm a little
3 puzzled by your use of the word the
4 music, because I see the words as being
5 part of that.

6 But it's the melodies that the
7 words are sung to that can be played
8 independently without singing the words
9 by playing it on an instrument or humming
10 it, I guess.

11 Q. So you would rather use the
12 words melodies instead of music?

13 A. Yes.

14 Q. So you will agree, as a
15 musicologist, that you can play the
16 melodies of Connor independently of the
17 lyrics of Connor, correct?

18 A. One could in theory, yes.

19 Q. Yes. And that would be an
20 instrumental version of Connor, correct?

21 A. There could be, yes.

22 Q. And you can recite the lyrics
23 of Connor without using the melodies or
24 the music of Connor, correct?

25 A. Yes.

1 JUDITH FINELL

2 Q. I'm going to ask you to assume
3 two things.

4 First, I am going to ask you to
5 assume that Brad Paisley is the sole
6 writer of the melodies or music of
7 Paisley "Remind Me." And I am going to
8 ask you to assume that Brad Paisley had
9 no access to the Connor work.

10 Look at paragraph 46.

11 A. Okay.

12 Q. And in the first sentence of
13 paragraph 46, if you remove the phrase
14 "And their specific melodic features and
15 deviations" from your sentence, making
16 the two assumptions that I just told you,
17 how does that change your or affect your
18 opinion?

19 MR. SANDERS: Object to the
20 form.

21 A. I don't -- are you saying just
22 divorce the lyrics from the melody?

23 Q. Yes, ma'am. That's exactly
24 what I am asking.

25 A. So I don't -- what is your

1 JUDITH FINELL

2 question then?

3 MR. HARVEY: Please read it
4 back.

5 (The reporter read back as
6 follows:

7 "QUESTION: And in the first
8 sentence of paragraph 46, if you
9 remove the phrase "And their specific
10 melodic features and deviations" from
11 your sentence, making the two
12 assumptions that I just told you, how
13 does that change your or affect your
14 opinion?")

15 A. It would be incomplete, because
16 when I say the distinctive use of these
17 lyrics, that has to do, also, with the
18 melodic features. So I can't really
19 divorce it.

20 Q. I am asking you, as a
21 hypothetical, which I am entitled to do,
22 since you're an expert here, to divorce
23 the two, divorce the melodies of music
24 from the lyrics of Connor "Remind Me," if
25 you take away the melody or music of

1 JUDITH FINELL

2 Connor, what impact does that have on
3 your opinion that it points sharply to
4 copying?

5 MR. SANDERS: Object to the
6 form.

7 A. I don't know.

8 Q. What impact does it have,
9 Ms. Finell, on your opinion about
10 substantial similarity or copying if Brad
11 Paisley wrote the melody of Paisley
12 "Remind Me," Brad Paisley had no access
13 to Connor, how does that impact your
14 opinion about substantial similarity or
15 point sharply to copying?

16 MR. SANDERS: Objection on
17 several grounds.

18 A. That's completely a different
19 question from the first one you just
20 asked me. I don't understand it now.

21 Q. Let me back up.

22 Assume that Brad Paisley had no
23 access to Connor, okay.

24 A. Yes.

25 Q. And assume that Brad Paisley

1 JUDITH FINELL

2 wrote all of the melody of the Paisley
3 "Remind Me," okay?

4 A. Yes.

5 Q. Assume that Chris DuBois and
6 Kelly Lovelace did not write the melody
7 of the Paisley "Remind Me."

8 A. Okay.

9 Q. Making those assumptions, how
10 does that affect your opinion where you
11 claim points sharply to copying in
12 comparing the two songs?

13 MR. SANDERS: Object to the
14 form.

15 A. What about the harmony?

16 Q. There is no music in the
17 hypothetical I am asking you, ma'am.

18 A. You said assume that he wrote
19 the melody. That is music. I don't
20 understand your question.

21 Q. If all you had is the printed
22 lyrics in Connor, how would that affect
23 your opinion about copying or substantial
24 similarity?

25 MR. SANDERS: Object to the

1 JUDITH FINELL

2 they are still there. But it wouldn't be
3 a musical work. It would be a work of
4 poetry, I suppose or literature.

5 Q. If all you had to go on was the
6 comparison of lyrics in Exhibit 5 or the
7 two lyric pages that you have with your
8 report, and you had no melody or no music
9 to go on, how would that impact your
10 opinion on substantial similarity or
11 copying?

12 MR. SANDERS: Object to the
13 form.

14 A. It wouldn't be a musical
15 opinion. It would be a literary opinion.
16 Most likely, I wouldn't be the one
17 consulted.

18 Q. So you would not have a
19 musicological basis upon which to say
20 that the two works based on the lyrics
21 were substantially similar?

22 MR. SANDERS: Object to the
23 form.

24 A. Not if they weren't set to
25 music. Then they wouldn't be music.

JUDITH FINELL

Q. Do you have an opinion as to whether these two sets of lyrics reflected in Exhibit 5 are substantially similar; yes or no?

A. They are substantially similar in their shared words. But what makes these works similar is the way in which they're used in the musical work, and the way in which they are highlighted in the musical work combined.

(CONTINUED ON NEXT PAGE TO ACCOMMODATE THE JURAT.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HARVEY: We thank you for
your time. And I understand that
Plaintiff's counsel would like to have
you read and sign.

MR. SANDERS: Yes.

MR. HARVEY: Anything you would
like to ask?

MR. SANDERS: No, I don't think
so.

[TIME NOTED: 5:32 p.m.]

JUDITH FINELL

Subscribed and sworn to
before me this _____
day of _____, 2015.

Notary Public

I N D E X

WITNESS	EXAMINATION BY	PAGE
Judith Finell	Mr. Harvey	5

E X H I B I T S

DEFENDANTS'	DESCRIPTION	PAGE
Exhibit 1	Ms. Finell's expert report	38
Exhibit 2	sheet music for the Paisley Remind Me	39
Exhibit 3	preliminary report, dated March 28th, 2013	44
Exhibit 4	notations on Remind Me - Connor Copyright, dated September 12th, 2015	44

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS (Continued):

Exhibit 5 side by side 144
 comparison of the
 lyrics of Connor and
 Paisley songs

(The court reporter has retained all
exhibits.)

PRODUCTION REQUESTS

How much Ms. Finell has been paid 293
from the beginning of the case up
through now

CERTIFICATION

I, Dawn Matera, a Notary Public for
and within the State of New York, do
hereby certify:

That the witness whose testimony as
herein set forth, was duly sworn by me;
and that the within transcript is a true
record of the testimony given by said
witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage, and that I
am in no way interested in the outcome of
this matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 4th day of November,
2015.

Dawn Matera

Dawn Matera

* * *

Change Reason Codes:

1. To clarify or complete the record.
2. For accuracy.
3. To correct transcript and typographical errors.

Location (page/lines)	Change from:	Change to:	Reason Code
7:16-17	"learned what are unusual, if you will, sort of solutions to a musical beginning"	"learned what are unusual, if you will, solutions to a musical beginning"	1
26:10	"they distinguish one another"	"they are distinguished from one another"	1
32:23	"song that we've talked about in my report"	"song that I've talked about in my report"	1
60:5-8	"or if I'm analyzing a recording of a musical work, which is a different element in a musical work."	"or if I'm analyzing a recording of a musical work, instead of sheet music or a lead sheet of a musical work."	1
60:23	"elements to begin with to compare, which"	"elements to begin with, which"	1
61:3	"But those are some of"	"Those are some of"	1
62:12-14	"recording copied another, whereas every element that one hears is at issue, or is it the underlying body of the music"	"recording copied another, whether every element that one hears is at issue, or if it is the underlying music"	1
72:19	"didn't use one to define it that way in"	"did not use a specific source to define it that way"	1

Connor & Connor
Judith Finell Deposition Transcript Errata (from deposition on October 29, 2015)
December 22, 2015

		in”	
84:2	“certain way that sort of drives my”	“certain way that drives my”	1
91:6,12,14,21, 92:8,11,22 93:2,6 93:11,25 183:14 184:7 185:8,17 186:7,11,15 187:3,3 187:4,6,8,9 194:25 195:4	“cord”	“chord”	3
91:3,8 92:4 93:20 94:4,5 182:23 183:9,15,19 184:2,3 185:3 187:2	“cords”	“chords”	3
94:20	“But there is certain consistencies I have”	“But there are certain consistencies I have”	1
98:4-5	“and there certainly parts of it where there probably is melismatic sections.”	“and there are probably parts of it containing melismatic sections.”	1
99:25	“Vocal”	“In vocal”	3
104:9	“No, I have never have.”	“No, I never have.”	3
133:5	“less steer implications”	“more sexual implications”	1

Connor & Connor
Judith Finell Deposition Transcript Errata (from deposition on October 29, 2015)
December 22, 2015

133:6	"But both of them"	"But for both of them"	1
134:5	"Sometimes as a attribute"	"Sometimes as a tribute"	3
163:4-9	"The partner phrase in Connor is the phrase that echoes the hook, and actually is part of the hook, but it's the part that wherever the music uses the lyrics 'Baby, remind me,' it's the same in Paisley."	"The partner phrase in Connor is found where the music contains the hook, preceded by the lyric 'Baby,' just as in Paisley."	1
167:5	"the..."	"the key words of the song."	1
174:23	"what really isn't unusual"	"what is really unusual"	1
174:24	"melodies that sing those"	"melodies that set those"	1
176:8	"the key words "Baby, remind me."	"the key words "remind me."	2
194:4	"precise."	"precise descriptions."	1
194:20-25, 195:2-5	"Rhythm describes the duration of musical material in this case or in musical cases. In other words, the length of time, usually in beats, that one particular note or chord is sustained before the next occurrence of the same thing, whether it's an individual note or a chord, which is a series of notes together."	"Rhythm describes the duration of musical material; in other words, the length of time, usually in beats, that one particular note or chord is sustained before the next note or chord occurs."	1
207:3	"Didn't itemize every"	"I did not itemize every"	3

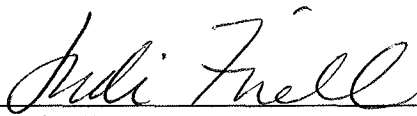
Connor & Connor
Judith Finell Deposition Transcript Errata (from deposition on October 29, 2015)
December 22, 2015

274:10-11	"I don't understand. Do you mean – "	"I don't understand."	1
293: 13-16	"Production request for how much Ms. Finell has been paid from the beginning of the case up through now indexed.)"	"My firm has been paid \$52,437.50."	1

STATE OF New York

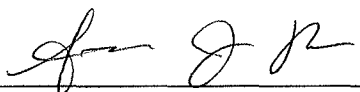
COUNTY OF Westchester

BEFORE ME, an officer duly authorized to administer oaths, on this day, personally appeared Judith Finell, who is personally known to me or who presented photographic identification to me, and who deposes and states that, having read her deposition taken on October 29, 2015 in the cause of Bowen v. Paisley, et al, Case No. 3:13-0414, pending in the United States District Court for the Middle District of Tennessee, Nashville Division, hereby certifies that said testimony is a true and accurate transcript, with changes noted on the attached errata sheet.



Judith Finell

Sworn to and subscribed before me, this 22 day of December, 2015



Notary Public
State of New York

My Commission Expires: 10/28/2017

FRANCISCO J. RIVERA
Notary Public, State of New York
Qualified in Westchester County
No. 01R16291915
My Commission Expires Oct. 28, 2017